

Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy

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*The world is slowly growing more tolerant and one day men will
be ashamed of their barbarous treatment of me, as they are
now ashamed of the torturings of the middle ages.***

*Americans have a very low tolerance for differentness, whether
it's racial, ethnic, or sexual.
Despite our rhetoric about individualism, we are a desperately
conforming people.****

I. INTRODUCTION

Ugly in tone, mean in spirit, and stoked by religious intolerance, a new wave of ballot measures¹ aimed at preventing lesbians, gay men, and bisexuals

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** Oscar Wilde (quoted in *UNNATURAL QUOTATIONS* 77 (Leigh W. Rutledge ed., 1988)).

*** Martin Duberman (quoted in *UNNATURAL QUOTATIONS* 108 (Leigh W. Rutledge ed., 1988)).

¹ This Article will discuss the process in which voters create, approve, repeal, or amend laws or ordinances by placing measures on a ballot and voting on them. This process is sometimes referred to as "direct democracy." The measures are also sometimes called plebiscites. See Kovic J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637 (1980). The Article will distinguish between initiatives and referenda, where appropriate. Some countries consider the initiative to be simply a type of referendum, but in the United States, a traditional distinction has been made between the two. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 508 n.4 (1982). Initiatives are those measures that are submitted directly to the voters upon a

from obtaining legal protection from discrimination, is being launched by conservative religious activists.² These anti-gay measures not only threaten recently obtained civil rights protections obtained by these groups, they join a newly invigorated trend by groups who seek to circumvent the system of checks and balances of the republican government established by this country's founders. A variety of approaches are being taken which attempt to limit the inclusion of the category of sexual orientation in antidiscrimination laws. Although these measures raise constitutional questions, many courts restrict consideration of constitutional issues prior to an election. Consequently, a number of the challenges being filed to prevent placement of these measures on the ballot are raising procedural and technical violations. Although important in trying to ensure that the election is fair and informed, the latter types of challenges do not permanently remove the issue from the electoral process. This Article will discuss the philosophy underlying ballot measures, the dangers they create for members of groups who are traditionally discriminated against in this society, the utilization of legal challenges to such measures, and the justifications for bringing such actions to prevent the placement of these discriminatory plebiscites upon the ballot. The Article will explore the concerns for pre-election challenges to both statutory and constitutional measures, discussing distinctions between the two when important.

matter brought by petition from electors without an intervening legislative process. The referendum is a measure which permits voters to approve or remove statutes or ordinances which have been enacted by a legislative body. REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (David Butler & Austin Ranney eds., 1978) [hereinafter REFERENDUMS]; James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 299 (1989). Ballot measures will be used to include both referenda and initiatives. Although these measures can be considered legislative in the sense that they also create laws, the term "legislative" in this Article will refer to the lawmaking process by elected local or state representatives in their official capacities. See also *Columbia River Salmon & Tuna Packers Ass'n v. Appling*, 375 P.2d 71, 73 (Or. 1962).

² Organizations in 10 states attempted to place initiatives on the 1994 ballot: Arizona, Florida, Idaho, Maine, Michigan, Missouri, Ohio, Oregon, Nevada, and Washington. The initiative offered by the American Family Political Committee in Florida was struck down by the Florida Supreme Court in *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1021 (Fla. 1994). The proponents in Ohio suspended their efforts during the pending litigation concerning the Cincinnati ballot initiative. The proponents in all of the other states except for Idaho and Oregon were unable to obtain sufficient signatures to place their initiatives on the ballot. This latter failure should not be taken as a sign of surrender in those states. Proponents promise to be back in many of them. As Oregon enters its third election on this issue, it is clear that the proponents of these proposals do not accept defeat easily.

Part II will describe and categorize the various textual approaches to anti-gay³ laws experimented with by conservative groups as they strive to find wording which will resonate most strongly with the electorate while minimizing potential legal challenges. Part III will discuss the underlying rationale for direct democracy, outlining the benefits and dangers. Part IV will examine in more detail the particular threat to persons who possess characteristics that traditionally result in discriminatory treatment in this society. The legal problems posed by the current group of anti-gay ballot measures, both constitutional and procedural, will be analyzed in Part V. Part VI will outline the rationale for both pre- and postelection challenges, arguing for the need to allow pre-election challenges, to most, if not all, of these measures. Although this Article will discuss the electoral process as it is being used against lesbians, bisexuals, and gay men, the problems discussed are also relevant to other groups that have traditionally experienced discrimination in this country.

II. THE BALLOT PROPOSALS

The measures discussed in this Article are all designed to prevent lesbians, gays, and bisexuals from receiving antidiscrimination protection through laws and government policies. Some also attempt to further restrict the rights of members of these groups by adding prohibitions on teaching about homosexuality in the schools or providing assistance to gay and lesbian groups. While some use pejorative language about gays and lesbians, some recent proposals refrain from mentioning the targeted groups at all. The measures offered thus far roughly fall into three categories: (1) overtly hostile, (2) specifically targeted, and (3) stealth proposals.

A. *Overtly Hostile Proposals*

Voters in Oregon in 1992 rejected a measure aimed at restricting the rights of lesbians, bisexuals, and gay men. This initiative, known as Measure Nine, not only identified the targeted groups and lumped them together with pedophiles, sadists, and masochists, it also portrayed homosexuality as

³ Some may object to the use of "anti-gay" to categorize this group of laws because they perceive the issues to also include the proper role of civil rights laws instead of opposition to gay men, lesbians, and bisexuals. Nevertheless, the way in which this group of laws is being used by the proponents of the measures makes it clear that they are meant to halt the legal progress made in areas that most gays, lesbians, and bisexuals in this society deem central to their legal advancement. The term also encompasses the broad range of issues covered by these measures.

"abnormal, wrong, unnatural, and perverse" and sought to have this view taught in public schools.⁴ Since the failure of Measure Nine in Oregon, a number of local cities and counties have passed anti-gay measures.⁵ Not satisfied with depriving lesbians, gay men, and bisexuals from being included in antidiscrimination laws, they also seek to prohibit other conduct and expression, some of it constitutionally protected, which might ameliorate the hostile treatment given to persons based upon a sexual orientation other than exclusively heterosexual.

A second group of measures omit the hostile epithets, but specify a broad range of activities, some of which are constitutionally protected, which they characterize as promoting homosexuality. For example, this type of measure has been proposed in Idaho, which originally proposed an Oregon-style measure, but later amended it. This initiative seeks to amend Idaho statutes to prohibit antidiscrimination protections for persons who engage in homosexual behavior.⁶ In addition, the Idaho proposal prohibits the recognition of domestic partnerships⁷ based on homosexual behavior,⁸ the expenditure of public funds

⁴ Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment Two*, 32 WASHBURN L.J. 367, 368 (1993). See *infra* Appendix J for a reproduction of Oregon Measure Nine § 41.

⁵ Since the rejection of Measure Nine, 23 local communities in Oregon have approved ballot measures prohibiting the passage of sexual orientation antidiscrimination laws, in spite of legislation making such measures void, and there is an effort to put another measure on the state ballot in 1994. Sura Rubenstein, *OCA, FOE Both Proclaim Vote Victory*, OREGONIAN, May 19, 1994, at E5.

⁶ Section 67-8002:

SPECIAL RIGHTS FOR PERSONS WHO ENGAGE IN HOMOSEXUAL BEHAVIOR PROHIBITED. No agency, department, or political subdivision of the State of Idaho shall enact or adopt any law, rule, policy, or agreement which has the purpose or effect of granting minority status to persons who engage in homosexual behavior, solely on the basis of such behavior; therefore, affirmative action, quota preferences, and special classifications such as "sexual orientation" or similar designations shall not be established on the basis of homosexuality. All private persons shall be guaranteed equal protection of the law in the full and free exercise of all rights enumerated and guaranteed by the U.S. Constitution, the Constitution of the State of Idaho, and federal and state law. All existing civil rights protections based on race, color, religion, gender, age or national origin are reaffirmed, and public services shall be available to all persons on an equal basis.

Idaho's Proposed Initiative § 67-8002. See *infra* Appendix B for a reproduction of this proposal.

⁷ Generally, so-called domestic partnership policies and legislation allow individuals to designate their romantic partner with whom they are engaged in a committed relationship to receive benefits similar to what the spouse of an individual would be entitled. For a

in a manner which promotes or expresses approval of homosexuality,⁹ the teaching of the idea to students in elementary and secondary schools that homosexuality is an acceptable behavior,¹⁰ or the ability of minors to access

description of such ordinances, see Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992). Because states do not allow people to marry someone of the same gender, it is through such policies that gay men and lesbians are enabled to obtain such benefits for their spouse equivalents. *But see* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993), in which the Hawaii Supreme Court held that a ban on same-sex marriages could violate the Hawaii equal protection clause. As this Article goes to print, however, the Hawaii legislature is attempting to reverse this position.

⁸ Section 67-8003 states:

EXTENSION OF LEGAL INSTITUTION OF MARRIAGE TO DOMESTIC PARTNERSHIPS ON HOMOSEXUAL BEHAVIOR PROHIBITED. Same-sex marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by any agency, department, or political subdivision of the State of Idaho.

Idaho's Proposed Initiative § 67-8003. See *infra* Appendix B for a reproduction of this proposal. For examples of similar proposed state initiatives, see *infra* Appendix E for a reproduction of Nevada's Proposed Minority Status and Child Protection Act § 21(1) and Appendix F for a reproduction of Washington's Proposed Initiatives § 4.

⁹ Section 67-8005 states:

EXPENDITURE OF PUBLIC FUNDS. No agency, department or political subdivision of the State of Idaho shall expend public funds in a manner that has the purpose or effect of promoting, making acceptable, or expressing approval of homosexuality. This section shall not prohibit government from providing positive guidance toward persons experiencing difficulty with sexual identity. . . .

Idaho's Proposed Initiative § 67-8005. See *infra* Appendix B for a reproduction of this proposal. For an example of a similar proposed state initiative, see *infra* Appendix F for a reproduction of Washington's Proposed Initiative 610 § 2.

¹⁰ Section 67-8004 states:

PUBLIC SCHOOLS. No employee, representative, or agent of any public elementary or secondary school shall, in connection with school activities, promote, sanction, or endorse homosexuality as a healthy, approved or acceptable behavior. Subject to the provisions of federal law, any discussion of homosexuality within such schools shall be age-appropriate as defined and authorized by the local school board of trustees. Counseling of public school students regarding such students' sexual identity shall conform in the foregoing.

books that address homosexuality in public libraries.¹¹

B. *Specifically Targeted Proposals*

A second group of proposals do not use terms such as perverse, abnormal, and unnatural, but still make clear that their targets are lesbians, bisexuals, and gay men. Also, unlike the overtly hostile proposals previously discussed,¹² these proposals do not specifically target protected activities such as public education or public libraries. Although the overt prejudice is softened by omitting the epithets hurled by Measure Nine, these propositions make reference to "minority status," "special rights," "affirmative action," "quotas," and other emotionally laden words and phrases, that are meant to convey the notion that more than equal rights is being sought by sexual orientation antidiscrimination laws. The proposal in this category that has received the most public attention is Colorado's Amendment Two. The amendment to the state constitution, passed by Colorado voters on November 3, 1992,¹³ takes a direct approach to prohibiting antidiscrimination protection for gays, lesbians, and bisexuals.¹⁴ Because of the electoral defeat of Measure

Idaho's Proposed Initiative § 67-8004. See *infra* Appendix B for a reproduction of this proposal. For examples of similar proposed state initiatives, see *infra* Appendix E for a reproduction of Nevada's Proposed Minority Status and Child Protection Act § 21(2) and Appendix F for a reproduction of Washington's Proposed Initiatives § 4.

¹¹ Section 67-8005 states, in part:

EXPENDITURE OF PUBLIC FUNDS. . . . This section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the normal library review process.

Idaho's Proposed Initiative § 67-8005. See *infra* Appendix B for a reproduction of this proposal. For examples of similar proposed state initiatives, see *infra* Appendix E for a reproduction of Nevada's Proposed Minority Status and Child Protection Act § 21(2)(d) and Appendix F for a reproduction of Washington's Proposed Initiative 610 § 2.

¹² See *supra* part II.A.

¹³ Amendment Two was passed by a margin of 53% to 47% despite polls that had consistently found the proposal to be losing. John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 154 n.5 (1993).

¹⁴ Amendment Two states:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby

Nine and the legal problems of the stealth initiative in Florida,¹⁵ described generally in the next section of this Article,¹⁶ it appears that this category of proposition is the one currently most favored.¹⁷

C. *Stealth Proposals*

Some of the more aggressive measures, such as the proposal in Idaho, raise a number of facial constitutional questions because of their breadth. In addition, the labelling of homosexuality as abnormal and perverse has been recognized as offensive to some voters who might otherwise vote for such a measure. Therefore, some proponents of these measures have more recently opted for initiatives that attempt to appear to take a less hostile and less challenging approach to gays, lesbians, and bisexuals. Thus, in Florida for example, the amendment to the Florida Constitution proposed by the American Family Political Committee (AFPC), a component of the American Family Association (AFA), did not even mention the words gay, lesbian, bisexual, homosexual, or sexual orientation. Instead the proponents attempted to permanently prevent any additional classifications from being added to existing antidiscrimination laws.¹⁸ This attempt to use language that avoids some of the more

homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b.

¹⁵ See *infra* part V.B.3.

¹⁶ See *infra* part II.C.

¹⁷ See *infra* Appendix A for a reproduction of Arizona's Proposed Initiative; Appendix C, for a reproduction of Maine's Proposed Initiative; Appendix I, for a reproduction of Cincinnati's Issue Three.

¹⁸ The proposed Florida amendment states, in part:

The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes, or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. As used herein the term "sex" shall mean the biological state of being either a male person or a female person; "marital status" shall mean the state of being lawfully married to a person of the opposite sex, separated, divorced, widowed or single; and "familial status" shall mean the state of being a person domiciled with a minor, as

inflammatory language has been offered for political and legal purposes.¹⁹ Despite the attempt to make the initiative and its summary appear neutral, the campaign literature of the proponents left little doubt as to whom its primary targets were and was just as misleading and volatile as that offered in the other states.²⁰

III. THE INITIATIVE PROCESS—DEMOCRATIC IDEAL?

A. *Initiatives and Referenda*

1. *Purposes*

The initiative and referendum processes that are increasingly being used in

defined by law, who is the parent or person with legal custody of such minor or who is a person with written permission from such parent or person with legal custody of such minor.

Florida's Proposed Initiative § 1(b). See *infra* Appendix H for a reproduction of this proposal.

¹⁹ David Caton, director of the anti-gay initiative effort of the American Family Association in Florida, told the press after the filing of the legal challenge to it that the proponents' lawyers had advised them that the Florida proposal was the best approach for legal and political reasons. Stephen Bousquet, *Groups Challenge Anti-Gay Ballot Issue*, MIAMI HERALD, Dec. 7, 1993, at 16A.

²⁰ The number that one called to receive the petition was 1-800-Gay-Laws. The letter which accompanied the petition states:

This petition is designed to stop homosexual activists and other special interest groups from improper inclusion in discrimination laws. . . . Therefore, this amendment would prevent homosexuality and other lifestyles from gaining special protection from inclusion in discrimination laws.

We have also enclosed a copy of the brochure titled "ARE HOMOSEXUAL RIGHTS TRADITIONAL CIVIL RIGHTS?" This brochure provides documentation that homosexuality does NOT meet the criteria for traditional civil rights protection.

Form Letter signed by David Caton, Chairman, American Family Political Committee of Florida (copy on file with author). The brochure referred to in the petition's cover letter contains a number of allegations comparing homosexuals to "true minorities," comparing income and educational levels as well as the percentage of frequent fliers in the homosexual community as opposed to the others. Despite the vague allegations of other special interest groups who will be restrained by this measure, none are identified in these materials.

a number of states²¹ are sometimes lauded in court cases as models of the democratic process.²² The California Supreme Court noted the initiative's progressive roots in its following pronouncement:

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them.²³

In addition to state statutory and constitutional measures, local ballot measures abound in an even larger number of states.²⁴

The purposes of the referendum/initiative have been noted as a matter of: (1) constitutional necessity—a requirement by some constitutions as a means of amending the constitution; (2) a legitimating function—demonstrating that governmental policies have popular support; and (3) a transfer of decision-making—allowing the people to decide issues which elected officials are unwilling or unable to resolve.²⁵ The referendum process got its initial impetus in this country from persons with populist inclinations,²⁶ although a number of

²¹ James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 44 n.7 (1983). As of 1990, 26 states permitted voters to initiate legislation or demand referral of legislative enactments. Thirty-six permitted statutory referenda. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1509–10 (1990).

²² In *James v. Valtierra*, 402 U.S. 137, 141 (1971), Justice Black stated that the provisions for direct democracy “demonstrate devotion to democracy, not to bias, discrimination, or prejudice.” The Court of Appeals of California, Fourth Appellate District, has also stated that the right of initiative or referendum is “one of the most precious rights of our democratic process.” *Mervyne v. Acker*, 11 Cal. Rptr. 340, 343 (Cal. Ct. App. 1961).

²³ *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976) (footnotes omitted).

²⁴ Eule, *supra* note 21, at 1510.

²⁵ REFERENDUMS, *supra* note 1, at 18.

²⁶ In the United States, the effort to adopt the referendum process was led by members of the Progressive movement generally between 1890 and American entry into World War I. The premises for the need for such a process were based on a faith in the unorganized, free individual and a hostility to intermediary organizations that interfered between the people and the government. Lobbyists and special interest groups are the contemporary incarnations of these intermediary organizations. REFERENDUMS, *supra* note 1, at 27–28; Lowenstein, *supra* note 1, at 507–08.

its current proponents represent a more conservative philosophy.²⁷ Its appeal is less contingent upon a particular ideology than it is a disillusionment with the representative governmental process. Thus, those who perceive elected officials to be unduly influenced by competing "special interest" groups are susceptible to utilizing this method of legislation and constitutional amendment.

2. Benefits

Advocates and scholars of direct democracy have advanced a number of theories which suggest the benefits of referenda and initiatives. They include the following:

(1) *Ballot measures permit all issues to be addressed.* It has been suggested that politicians will often avoid controversial and divisive issues in order to avoid voter hostility. The initiative permits such issues to be addressed when the legislative and executive branches refuse to deal with them.²⁸

(2) *Direct democracy permits decisions to be brought close to the people.* Under this theory, ballot measures permit people to directly make decisions about policy issues, rather than through others, and thus, the mystery of government policymaking is clarified. This clarification of the empowerment of the individual can be viewed as a legitimate end in itself.²⁹

(3) *Ballot measures allow public decisions to be arrived at publicly.* This notion is based upon the belief that intermediary organizations often make decisions in private so that the public is unaware of what is being done to it.³⁰ Proponents of this theory believe that democracies thrive best when decision-

²⁷ See Eule, *supra* note 21, at 1507 (noting conservative politicians and think tanks praising the virtues of direct democracy). Many modern measures attempt to limit civil rights, personal lifestyle, and moral choices. Marc Slonim & James H. Lowe, Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 180-82 (1979).

²⁸ REFERENDUMS, *supra* note 1, at 29-30. On the other hand, referenda are less likely to offer this benefit because they are created by legislative bodies. Referenda are, however, somewhat useful in this arena because some legislative bodies, which would not directly pass a tax increase or other controversial measure, are willing to give the electorate the chance to vote on the issue because it removes the difficult decision from their hands.

²⁹ *Id.* at 30.

³⁰ But see Sirico, *supra* note 1, at 670-71. Professor Sirico argues that the legislature is required to deliberate in public and thus provide a more accessible record upon which to find the basis for the legislation. Depending upon the type of judicial review required by a law, a public record is important in determining whether the law has a rational basis. Ballot measures lack this required public record. The proponents of the measure have a lighter burden to explain their measure than does the legislature, and the voter has no burden at all to publicly account for his vote.

making is done in a completely open manner.³¹

(4) *Ballot measures more accurately express the popular will.* This theory argues that when the popular will is expressed through any type of intermediary group, it is prone to distortion. The most common contemporary incarnation of such intermediary organizations are the groups which lobby for and against legislation with the executive and legislative branches of government. Such a theory also rests upon the assumption that the popular will is the sum of the society's individual wills.³²

(5) *Direct democracy helps end citizen apathy and alienation.* The essence of this claim is that persons feel cynical about the ability of politicians to avoid special interest manipulation, causing an apathy about the political process. Through the referendum, persons are given direct control over the lawmaking process, and thus feel empowered.³³

(6) *Ballot measures serve the public interest.* This claim is based upon the notion that the will of the majority is an expression of the public interest. Again, this theory expounds the view that intermediate organizations represent special interests that are not in the best interest of the public community as a whole.³⁴

(7) *Direct democracy helps citizens maximize their human potential.* This theory posits that political participation enhances the full development of every citizen's human potential. If there is any loss in the public good, it is outweighed by the gain from the fulfillment of the individual's realization of his full growth.³⁵

(8) *Direct democracy has a positive educational impact.* Some proponents of ballot measures also note the educational value of the campaigns surrounding

³¹ REFERENDUMS, *supra* note 1, at 30-31.

³² This notion is an expression of the direct democracy philosophy of Jean-Jacques Rousseau who wrote:

Sovereignty cannot be represented for the same reason that it cannot be alienated; its essence is the general will, and that will must speak for itself, or it does not exist; it is either itself or not itself; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be their representatives; they can only be their commissioners, and as such are not qualified to conclude anything definitively. No act of theirs can be a law, unless it has been ratified by the people in person; and without that ratification nothing is a law.

Id. at 31 (citing 3 JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 85 (Charles Frankel trans., 1947)).

³³ *Id.* at 31-32.

³⁴ *Id.* at 32-33.

³⁵ *Id.* at 33.

such measures. The publicity given to such issues can raise public awareness and inform voters of the merits and dangers of various public policy issues.³⁶

3. Dangers

On the other hand, many persons believe that referenda and initiatives also raise a number of troubling problems. They include:

(1) *Ballot measures weaken the power of elected authorities.* This claim is based upon the theory that increased usage of ballot measures will remove issues out of the control of elected officials. Such removal decreases the types of issues over which the officials have influence. Currently, one can observe this phenomenon in the negative reaction to representative government expressed by those who demonstrate disdain of the political machinations of the legislative, and to a lesser extent, the executive branches of government.³⁷ This disdain results in ballot measures that attempt to restrict the ability of elected officials to pass legislation or to limit the number of terms they may serve.³⁸

(2) *Ordinary citizens are less able to make wise decisions on complex or emotionally volatile issues.* This theory espouses the idea that the problems facing modern governments are often complex and deserve the type of lengthy, considered deliberations best handled by persons considering the issue after study and debate. One commentator has noted that ballot propositions are often poorly drafted, complex, and polarizing in effect.³⁹ Because of competing time pressures, ordinary citizens are not able to devote the time and consideration that the issues deserve.⁴⁰ Further, the complexity and number of measures on a

³⁶ Eugene C. Lee, *California, in REFERENDUMS*, *supra* note 1, at 87, 97 (citing California proposition to legalize marijuana whose sponsors knew that it had little chance of passage, but who believed that the campaign would provide important public education).

³⁷ *REFERENDUMS*, *supra* note 1, at 34.

³⁸ *See, e.g.*, Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991); *Stumpf v. Lau*, 839 P.2d 120 (Nev. 1992).

³⁹ Fischer, *supra* note 21, at 66. Professor Fischer notes:

Ballot propositions qualified by petition are not drafted in a way that inspires confidence in their care for and attentiveness to the problems they address. Written in secret by those who share a common view of societal problems, ballot propositions eschew compromise and tend toward extremism with appalling frequency.

Id. (citation omitted).

⁴⁰ *REFERENDUMS*, *supra* note 1, at 34. Some studies have shown that as many as 10 to 15% of voters cast ballots contrary to their policy preferences. Eule, *supra* note 21, at 1518.

ballot, which also include a number of candidates for office, may simply confuse voters.⁴¹ This does not assume that voters are lazy or ignorant. Some ballots are simply extremely long.⁴² Many persons will therefore choose not to vote on some propositions.⁴³ In addition, referenda are often used to appeal to the worst types of irrational fears.⁴⁴ Sensitive, complex political campaigns are often reduced to simplistic moral judgments by the proponents.⁴⁵

(3) *Ballot measures fail to measure the intensity of the belief of the voters.* This theory is based upon the notion that on some issues, certain persons have a stronger interest in determining their outcome. Elected representatives must sometimes be more sensitive to strongly held views by some of their constituents, even when the constituency does not constitute a majority, because the official must represent all of his constituents.⁴⁶ This failure to account for such intensity can increase the polarizing effect of a ballot measure that is approved by a majority who lack strong feelings about the issue against the will of a minority significantly impacted by it.

(4) *Ballot measures force decisions rather than consensus.* The referendum/initiative process reduces public policy issues to yes or no propositions. Critics of the plebiscite opine that some public policy measures are best resolved through a consensus-building process where solutions are worked out in a spirit of give and take. Forcing an either/or decision increases political polarization and creates a mentality where the victory of one group

⁴¹ See Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1504-06 (1987); see also Robert Horvat, Comment, *The Oregon Initiative Process: A Critical Appraisal*, 65 OR. L. REV. 169, 180 n.63 (1986) (citing an Oregon study that only a small percentage of Oregon voters read the handbook explaining the measures and an even smaller percentage understood the substantive content of many of the proposals).

⁴² Professor Eule relates that during the 1988 election, he received a 159 page summary and analysis of the state ballot measures in California, a 64 page summary for the Los Angeles City measures, and a separate pamphlet for the Los Angeles County measures. Eule, *supra* note 21, at 1508-09.

⁴³ Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 CAL. L. REV. 735, 740 (1988) (citing 1982 study of elections in 18 states and the District of Columbia showing that a significant percentage of voters who went to the polls did not vote on the ballot issue question).

⁴⁴ Professor Derrick Bell has stated: "Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns." Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 19 (1978).

⁴⁵ Slonim & Lowe, *supra* note 27, at 183.

⁴⁶ REFERENDUMS, *supra* note 1, at 35.

over the other becomes the goal.⁴⁷ In addition, it may distort the actual will of the majority.⁴⁸ Even persons who are supportive of direct democracy have noted this problem with some ballot measures.⁴⁹

(5) *Ballot measures raise special dangers to minorities.* Because this issue is of critical significance to the groups affected by the propositions analyzed in this Article, this concern will be discussed in detail below, but it is one that most persons who have studied ballot measure laws have noted.⁵⁰

(6) *Ballot measures weaken representative government.* Critics contend that as referenda/initiatives increase, they will weaken the power of the representative government. As the power of elected officials weakens, so will the desire of some of the most qualified persons to seek elective office.⁵¹ Further, these measures can be seen as circumventing the republican form of government established on both the federal and state levels.⁵² With the ballot measure, the voter, unlike an elected official, is not subjected to any public process when choosing to cast his vote. He is responsible to no one but himself and is not subjected to the public scrutiny of the elected official. Thus, the

⁴⁷ *Id.*

⁴⁸ Eule, *supra* note 21, at 1520-22.

⁴⁹ In the conclusion to their comparative study of referenda, Butler and Ranney note:

Referendums disturb politicians—and us—because they tend to force the decision makers, the voters, to choose between only two alternatives: they must either approve or reject the measure referred. There is no opportunity for continuing discussion of other alternatives, no way to search for the compromise that will draw the widest acceptance. Referendums by their very nature set up confrontations rather than encourage compromises. They divide the populace into victors and vanquished. They force decisions often before the discussion process has had a chance to work itself out fully. Surely this is a great deficiency.

REFERENDUMS, *supra* note 1, at 226.

⁵⁰ See *infra* part IV.

⁵¹ REFERENDUMS, *supra* note 1, at 36-37.

⁵² U.S. CONST. art. IV, § 4 provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." Whatever this clause means, it would appear that the United States Supreme Court has declined to consider it an issue for the judiciary to enforce. See Fischer, *supra* note 21, at 61-62 (citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (refusing to intervene between two competing groups who claimed to be the government of Rhode Island and calling the issue a political question which was best left to the executive and legislative branches to resolve) and *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U.S. 118 (1912)). Professor Fischer does note that state courts have not been as unwilling to consider Guarantee Clause issues. *Id.* at 63.

disincentive to place personal interest ahead of public good is much weaker for an individual in a voting booth than it is for an elected official whose particular vote will be scrutinized by the media and the public alike.⁵³

(7) *Direct democracy fails to represent the true will of the people.* Some commentators have argued that referenda/initiatives may fail to truly reflect the will of the public.⁵⁴ First, they only reflect the views of those who vote at a particular election, which may not be representative, particularly with an emotional measure that may disproportionately attract voters with strong feelings about the proposal.⁵⁵ Further, the notion that these measures truly reflect the will of the people belies the amount of attention the voting public gives to most measures.⁵⁶ Many voters do not decide on the measure until the eve of the election.⁵⁷ This should not be surprising since many of the measures are complex or confusing.⁵⁸ Of course this argument can be raised about almost any election. It may be more significant, however, when the election denies one group of citizens the ability to seek laws that would prohibit arbitrary discrimination against them.

⁵³ James J. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881, 902 (1970); Slonim & Lowe, *supra* note 27, at 181.

⁵⁴ Eule, *supra* note 21, at 1513-22.

⁵⁵ It has been noted that of the 2,003,375 registered voters in Colorado, only 1,597,166 went to the polls and 1,524,117 voted on Amendment Two. Of those who voted, 813,966 voted in favor of the amendment, which accounted for only 40% of registered voters and an even smaller percentage of voting age citizens. Niblock, *supra* note 13, at 189 (citing NATALIE MEYER, STATE OF COLORADO, ABSTRACT OF VOTES CAST 1992, at 142 (1993)).

⁵⁶ The Montana Supreme Court noted this problem when it stated:

The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates. We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law, initiated by petition, who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information.

Sawyer Stores, Inc., v. Mitchell, 62 P.2d 342, 348-49 (Mont. 1936) (quoting Westbrook v. McDonald, 43 S.W.2d 356, 360 (Ark. 1931)). But see Horvat, *supra* note 41, at 172 (questioning the effect of language in petitions and ballots).

⁵⁷ Lee, *supra* note 36, at 110-11.

⁵⁸ See *supra* notes 39-45 and accompanying text.

(8) *Ballot propositions may be more difficult to repeal.* Some states make it more difficult to change a ballot proposition, once approved.⁵⁹ Even without legal restrictions, legislators will often feel a pragmatic reluctance to overturn a matter approved by the electorate.⁶⁰

In addition to the preceding substantive dangers, there are a number of practical concerns which arise with contemporary initiatives. Ballot measures are sometimes tied to candidate campaigns, which may cause such measures to succeed or fail based upon their tie to a candidate.⁶¹ Whether tied to a candidate or not, the ballot measure is also influenced by the turnout for other candidates and measures on the same ballot.⁶² Although not always determinative, the amount of funding for a ballot campaign may also influence the result.⁶³ Furthermore, ballot measures increasingly involve petitions in which the signatures are gathered by professional signature-gatherers, and the campaigns are run by professional campaign organizations. The professionalization of the campaigns is not necessarily bad, but it undercuts the idealistic notion of the initiative as direct democracy in action, in which citizens with a burning commitment to an issue are maximizing their ultimate potential as humans by bringing the issue to the ballot.⁶⁴ Rather than dramatically alter the influence that special interest groups maintain over legislation, one commentator has concluded from his study of the process in California, that:

What emerges from this review is that while a few groups outside the main political stream occasionally try to employ the initiative process, the main actors are those who regularly do battle in legislative corridors or in campaigns for elective office. For these groups, the initiative is mainly another weapon—or hurdle—in the contest for political power and influence.⁶⁵

⁵⁹ See, e.g., WASH. CONST. art. II, § 41 (forbidding the legislature from amending or repealing a popular enactment within two years unless a two-thirds majority of each house of the legislature approves).

⁶⁰ Slonim & Lowe, *supra* note 27, at 183.

⁶¹ Lee, *supra* note 36, at 99.

⁶² *Id.* at 108.

⁶³ *Id.* at 103-04. It is difficult to estimate the impact of fundraising abilities of the opposing groups in these campaigns. In a study of 25 ballot propositions in California between 1968 and 1980, the amount spent on campaigns was not always determinative. The study concluded that although one-sided spending was not effective when supporting a proposition, it was almost invariably successful when it was used by the side in opposition. Lowenstein, *supra* note 1, at 511.

⁶⁴ See Lee, *supra* note 36, at 101.

⁶⁵ *Id.* at 99.

B. Procedural Requirements for Initiatives and Referenda

Although most states have used constitutional referenda since their formation, the other forms of direct democracy did not take hold until the late nineteenth and early twentieth centuries.⁶⁶ Over twenty states permit citizens to create or amend statutes or constitutional provisions through the initiative process.⁶⁷ All but Delaware require that constitutional amendments must eventually be approved by referendum.⁶⁸ Most states also allow local governmental units to place initiative or referendum questions on the ballot.⁶⁹ The states impose procedural requirements to attempt to ensure that the provisions have at least minimal interest among the voters. Such provisions sometimes require a certain percentage of voters to sign petitions and may require that the signatures be distributed across the state.⁷⁰ They also usually impose signature verification requirements.⁷¹ These requirements do not prevent irregularities and may even encourage them if the requirements are

⁶⁶ Austin Ranney, *United States, in* REFERENDUMS, *supra* note 1, at 67, 69.

⁶⁷ The following state constitutions permit amendment or revision through the initiative process: ARIZ. CONST. art. XXI, § 1; ARK. CONST. amend. VII; CAL. CONST. art. II, §§ 8, 10, art. XVIII, § 3; COLO. CONST. art. V, § 1; FLA. CONST. art. XI, §§ 3, 5; ILL. CONST. art. XIV, § 3; ME. CONST. art. IV, pt. 3, § 18; MD. CONST. art. XVI, §§ 1-4; MASS. CONST. amend. LXXXI, amend. XLVIII, pt. III, § 2, pt. IV, §§ 1-5; MICH. CONST. art. XVII, § 2; MO. CONST. art. III, §§ 50, 51; MONT. CONST. art. XIV, § 9; NEB. CONST. art. III, §§ 2, 4; NEV. CONST. art. XIX, §§ 2, 4; N.D. CONST. art. III, §§ 1-10; OHIO CONST. art. II, §§ 1(a), 1(b); OKLA. CONST. art. V, §§ 2, 3; OR. CONST. art. IV, §§ 2-4; S.D. CONST. art. XXIII, §§ 1, 3.

⁶⁸ Colantuono, *supra* note 41, at 1478.

⁶⁹ See *supra* note 21 and accompanying text.

⁷⁰ See, e.g., CAL. CONST. art. II, § 8(b) (requiring five percent of voters in last gubernatorial election for statutory initiatives and eight percent of voters in last gubernatorial election for constitutional amendments); ME. CONST. art. IV, pt. 3, § 18(2) (requiring ten percent of voters in last gubernatorial election); MICH. CONST. art. XII § 2 (requiring ten percent of voters in last gubernatorial election); MO. CONST. art. III, § 50 (requiring eight percent of voters in two-thirds of the congressional districts for constitutional amendments, five percent of such voters for proposing laws); NEV. CONST. art. 19, § 2(2) (requiring ten percent of voters in last general election in at least seventy-five percent of the counties); OR. CONST. art. IV, § 2(b) (requiring six percent of vote in last gubernatorial election for statute) and 2(c) (requiring eight percent of vote in last gubernatorial election for constitutional amendment).

⁷¹ See, e.g., ME. CONST. art. IV, pt. 3, § 18(2); MICH. CONST. art. XII, § 2; see also *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993) (upholding Michigan requirements concerning the dating of petition forms and the manner in which warnings to petition-signers were to be made).

sufficiently high.⁷² Other states impose reading level requirements.⁷³ In some states, however, the procedural hurdles are indeed minimal.⁷⁴

C. Textual Requirements

1. Single Subject

Some states also have textual requirements that attempt to guarantee clarity and fairness in the voting process. One typical example is the requirement that the initiative cover only a single subject.⁷⁵ This requirement serves two purposes: (1) it helps to prevent an initiative from being too complex for understanding, and (2) it prevents "logrolling," a process by which an unpopular measure is linked with a popular one with the hope that the unpopular issue will be passed because voters want the popular one.⁷⁶ This principle is somewhat elusive as almost any measure can be broken into subsections. The courts have attempted to characterize the standard in various manners, including the "functional" test that attempts to determine if all of the sections of a proposal are germane and functionally related.⁷⁷ Some states also differentiate between amending a constitution and revising it.⁷⁸

2. Ballot Summary and Title

In addition, some states will require that the ballot have a title or summary

⁷² See Fountaine, *supra* note 43, at 746, for a description of forgery, deception, and other illegal activities engaged in by signature-gatherers in California. See also Krivanek v. Take Back Tampa Political Campaign, 625 So. 2d 840 (Fla. 1993), *cert. denied*, 114 S. Ct. 1538 (1994) (overturning a referendum that repealed Tampa's ordinance prohibiting sexual orientation discrimination because of petitions invalidated as a result of signatures obtained from persons ineligible to vote).

⁷³ See, e.g., OR. REV. STAT. § 250.039 (1991).

⁷⁴ For example, until recently, the Colorado Constitution only required eight percent for constitutional initiatives (five percent for statutory ones) of the number of total electors, as opposed to persons who actually voted in a given election, without geographic distribution requirements. COLO. CONST. art. V, § 1 (amended 1980).

⁷⁵ See OR. CONST. art. IV, § (2)(d); FLA. CONST. art. 11, § 3; CAL. CONST. art. II, § 8(d).

⁷⁶ See, e.g., Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984); Fine v. Firestone, 448 So. 2d 984 (Fla. 1984).

⁷⁷ See, e.g., Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978) (upholding Proposition 13 tax measure).

⁷⁸ See, e.g., OR. CONST. art. XVII; McFadden v. Jordan, 196 P.2d 787 (Cal. 1948), *cert. denied*, 336 U.S. 918 (1949); Holmes v. Appling, 392 P.2d 636 (Or. 1964).

that explains the substance of the proposal in a manner that assists the electorate in understanding the proposition upon which it is voting.⁷⁹ A number of courts have attempted to interpret what this requirement entails.⁸⁰ Due to the complexity of some measures and the need to keep the summaries relatively brief,⁸¹ this standard can also be daunting.⁸² The summaries are sometimes prepared by the proponents of the measure,⁸³ and sometimes by a state official.⁸⁴ In addition to providing adequate information, courts may also require that the summary not omit material facts.⁸⁵ The requirements of the summary may be enforced at either the petition-gathering stage or when the measure is placed upon the ballot.

D. The Benefits and Dangers Analysis of Anti-Gay Ballot Measures

The philosophical justifications for giving deference to plebiscites in this substantive area is not only unwarranted by constitutional doctrine, but is contrary to the philosophical justifications for direct democracy. Returning to the eight benefits of unrestricted direct democracy listed in Part III(A)(2) of this Article, some would argue that some of the benefits of this process are met by the anti-gay measures. They permit the controversial issue of gay rights to be faced. They allow the decision to be made directly by the people. The decisions are reached after public discussions through the mass media and public campaigns. The vote would be seen by some as a true expression of the popular will. The emotion and intensity of the campaigns denote a lack of apathy and alienation by at least some of the voters. For the victors of the campaigns, it could be asserted that the public interest has been served. To the

⁷⁹ See, e.g., MICH. CONST. art. XII, § 2; ALASKA STAT. § 15.45.320 (1988); FLA. STAT. ANN. § 101.161 (West Supp. 1994).

⁸⁰ See, e.g., *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275-76 (Alaska 1982) (holding that summaries must be truthful and impartial); *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982) (holding that a summary must contain no hidden meanings and no deceptive phrases, giving fair notice of the meaning and effect of the proposed amendment); *In re Opinion of the Justices*, 171 N.E. 294 (Mass. 1930); *Sawyer Stores, Inc. v. Mitchell*, 62 P.2d 342 (Mont. 1936).

⁸¹ See, e.g., OR. REV. STAT. § 250.035(1) (1991).

⁸² See *infra* notes 158, 169-77, 187-92 and accompanying text.

⁸³ See, e.g., FLA. STAT. ANN. § 101.161 (West Supp. 1994).

⁸⁴ See, e.g., CAL. CONST. art. II, § 10(d); IDAHO CODE § 34-1809 (1994); OR. REV. STAT. § 250.065 (1990).

⁸⁵ See, e.g., *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992) (striking a proposed amendment because the summary failed to explain that the new taxation rate on leaseholds of government-owned property would be based on the real property method and thus could be increased fifteen-fold).

extent that ballot campaigns involve persons not otherwise involved in the political process, their potential as citizens may have been maximized. Finally, some educational impact may be accomplished through the campaigns.

On the other hand, a closer evaluation of these benefits reveals that the normal advantages of ballot propositions are considerably weaker with the anti-gay measures. The issue-avoidance consideration is not present with these measures because over one hundred jurisdictions have approved sexual orientation discrimination and a number of other jurisdictions have considered it.⁸⁶ These plebiscites are trying to remove the issue from the agenda, rather than add to it. The misinformation supplied by the proponents of these measures undercuts much of the benefit to be gained from public discussion of gay, lesbian, and bisexual equality rights. Whether this issue truly expresses the public will is open to debate. Certainly, the issue of whether the public interest is being served by these measures is hotly contested by many civil rights activists. Finally, because of the misrepresentation noted, some would contend that the public has been misled by the distortions provided by the proponents of these measures.⁸⁷

Furthermore, the dangers listed in Part III(A)(3) seem to be even more strongly posed by these initiatives and referenda. These measures directly weaken the power of elected authorities, particularly those measures that would permanently prevent elected officials from passing legislation in the future concerning the issue. This use of the ballot proposition does more than provide an alternative to the republican legislative process, it attempts to permanently supplant it in some areas of the law. Further, these measures demonstrate the problems of permitting voters to contemplate complex, emotionally charged issues. The manipulation of legal concepts and the misrepresentation of social science data has marred the campaigns. As the polling in Colorado demonstrated, the vote on these measures often turns upon the vote of persons without strong feelings about them.⁸⁸ The anti-gay measures strongly represent the problems of polarization. Rather than address compromise and consensus, the voters are forced to make unnecessarily restricted choices. Many gays, lesbians, and bisexuals would agree that quotas, preferences, and special statutes are not necessary or even sought in most circumstances, but these plebiscites prevent any ability to construct a compromise on the issue. Voters who feel hesitant about adding more groups to the civil rights statutes in Idaho are forced to also vote for the draconian restrictions on teachers and public

⁸⁶ Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905 (1993).

⁸⁷ AMERICAN CIVIL LIBERTIES UNION, ACLU BRIEFING BOOK 38-40 (1993) [hereinafter ACLU].

⁸⁸ *Id.* at 61.

libraries if they are to support the measure.⁸⁹ These measures clearly weaken representative government. Passage would prevent a group that could demonstrate unfair discrimination from obtaining relief from its elected officials. The lack of public accountability also was evident in the Colorado election in which the polls repeatedly showed the measure going down to defeat, but in the secrecy of the voting booth, the voters acted differently.⁹⁰ Finally, the distortions and fear-mongering raise a question as to whether the true will of the people is being captured through these elections.⁹¹ These measures present a clear and present danger to gays, lesbians, and bisexuals, as well as sound the clarion call to other groups discriminated against in this society.

In addition to the factual misstatements noted with Colorado's Amendment Two, the proponents were advised to use the terms minority status, quota preferences, and protected status all before the term "discrimination," which was the last word in the descriptive portion of the amendment.⁹² The use of emotionally laden terms as an attempt to generate negative emotions for the proposal and to place them at the front of it were a calculated attempt to influence voters. This attempt to campaign within the framework of the initiative itself is troubling because it misleads the voters. Not only were the other terms geared to arouse the emotions of the voter, they were also arguably irrelevant, as the antidiscrimination laws at which this measure was aimed do not require the notions described.

Special concerns may also be warranted when an initiative is proposed or when the matter is constitutional in nature. As has been noted, procedures that permit amendments to be easily passed may undercut the deliberation and stability one seeks in constitutional law.⁹³ Proponents of this theory of constitutional law believe that constitutions should be confined to questions concerning the authorization of, procedural aspects of, and limits on governmental power.⁹⁴ Those states that allow the constitution to be easily amended often find that their constitutions are, in fact, amended frequently.⁹⁵

⁸⁹ See *supra* notes 6–11 and accompanying text.

⁹⁰ The polls indicated that, two days prior to the election, voters disapproved of Amendment Two by 54% to 40%. The ultimate approval by 53% to 47% thus showed a twenty-point difference. Similar polling results have occurred in elections involving African-American political candidates. ACLU, *supra* note 87, at 65–66; see also Niblock, *supra* note 13, at 154 n.5.

⁹¹ See generally ACLU, *supra* note 87.

⁹² *Id.* at 39–40.

⁹³ See Colantuono, *supra* note 41, at 1509.

⁹⁴ REFERENDUMS, *supra* note 1, at 76.

⁹⁵ See Advisory Opinion to the Attorney General—Limited Marine Net Fishing, 620

IV. THE OPPRESSIVE TENDENCIES OF BALLOT INITIATIVES

A. *The History of Ballot Initiatives Versus Racial Minorities*

In spite of the idealistic statements by some courts and proponents of legislative measures obtained through the ballot box, the reality of the ballot measure is that it is sometimes used to attack minority groups or to promote an extreme position on an emotional issue.⁹⁶ Because referenda or initiatives are decided by majority vote, the danger exists that minority groups will have their interests overridden and ignored.⁹⁷ One commentator has remarked that "[a]n untrammelled majority is indeed a dangerous thing [T]he majority can tyrannize the minority."⁹⁸ Ballot measures directed toward various minorities are frequently used in contemporary society.⁹⁹

Other minority groups in this country have faced ballot measures similar to

So. 2d 997 (Fla. 1993), in which Justice McDonald, in a concurring opinion, lamented both the frequency of and the insertion of statutory matter into constitutional amendments:

Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments.

. . . However, the legislative power of the state is vested in the Legislature, art. III, § 1, and on matters that are statutory in nature, a concerted effort should be made to have the Legislature address the subject. The technical requirements, such as the single-subject rule and the requirements of section 101.161(1), Florida Statutes (1991), appear insufficient to prevent abuse of the amendment process.

Id. at 1000 (McDonald, J., concurring) (footnotes omitted). Justice McDonald noted that between 1968 and 1984, Florida's constitution was amended 41 times, at a rate of 2.4 per year. Since 1980, 37 of 44 amendments were adopted, including 4 of the 6 proposed by initiative. *Id.* at 1000 n.2 (citing Colantuono, *supra* note 41, at 1509 n.232).

⁹⁶ See *supra* notes 44, 91-92 and accompanying text. See generally Fisher, *supra* note 21.

⁹⁷ REFERENDUMS, *supra* note 1, at 36.

⁹⁸ JOHN H. ELY, DEMOCRACY AND DISTRUST 8 (1980).

⁹⁹ In November 1988, voters approved initiatives declaring English as the official language in Arizona, Colorado, and Florida; indigent women were denied funding for abortions in Arkansas, Colorado, and Michigan; and California authorized involuntary AIDS testing for sex crime suspects and assailants of police and emergency workers. Eule, *supra* note 21, at 1551. In California, however, voters rejected an initiative seeking to restrict the rights of gay and lesbian public school teachers, and in 1986 they defeated an attempt to empower health authorities to quarantine persons with AIDS. *Id.* at 1586.

those being used against lesbians, gay men, and bisexuals today. Attempts to thwart racial discrimination laws were common during the early years of the Civil Rights Movement.¹⁰⁰ In 1978, Professor Derrick Bell noted: "[T]he experience of blacks with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is."¹⁰¹ Professor Bell additionally noted that the threat of referenda was serious for other discrete minorities in addition to racial groups.¹⁰² He argued that the public nature of the legislative process that can transform a conservative politician into a moderate one is diluted in the privacy of the voting booth.¹⁰³ Elected representatives have a duty to govern on behalf of all of their constituents, including minority constituents.¹⁰⁴ The United States Supreme Court has previously acknowledged this danger with respect to racial minorities and struck measures which erected impermissible hurdles for members of such groups.¹⁰⁵

Using ballot measures against minorities is especially troubling because the electorate tends to differ from the total adult population. Lower socioeconomic groups, minorities, the indigent, and the uneducated tend to vote in smaller relative numbers than the rest of the population.¹⁰⁶ In order to subvert the prejudicial impact of these measures, one commentator has assumed that the courts must provide a protective role in this area.¹⁰⁷ Several others who have

¹⁰⁰ Even before this century, plebiscites were brought in Indiana, Illinois, Kansas, and Oregon that effectively prevented free blacks from settling in their states and territories. Sirico, *supra* note 1, at 641 n.33.

¹⁰¹ Bell, *supra* note 44, at 1.

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 14. This public chastening effect is further borne out by the polls in Colorado in which likely voters repeatedly indicated their opposition to Amendment Two, but voted the opposite. *See supra* note 90.

¹⁰⁴ Slonim & Lowe, *supra* note 27, at 188.

¹⁰⁵ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (overturning a statewide initiative to repeal a busing plan adopted by the Seattle school district to ameliorate racial segregation); *Hunter v. Erickson*, 393 U.S. 385 (1969) (overturning a city charter amendment that repealed existing antidiscrimination ordinances and requiring future voter approval of any city ordinance dealing with racial, religious, or ancestral discrimination in housing); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (striking a facially neutral amendment to the California Constitution, which would have prevented the state from interfering with a person's absolute right to sell or rent property to whomever he wanted).

¹⁰⁶ REFERENDUMS, *supra* note 1, at 108-09.

¹⁰⁷ Professor Lee notes in his summation of referendum/initiative concerns:

The initiative will continue to permit "flashes of prejudice and emotion to sweep

studied voter initiatives also have stated that some type of safety mechanism is necessary to protect minority interests.¹⁰⁸

B. The Use of Ballot Measures Against Lesbians, Bisexuals, and Gay Men

The current spate of anti-gay initiatives are only the second wave of such measures. The first wave began with the campaign of evangelist singer Anita Bryant who led a repeal of a sexual orientation antidiscrimination ordinance in Dade County, Florida.¹⁰⁹ In addition to the repeal of civil rights protections, other anti-gay legislation was also spawned from these campaigns.¹¹⁰ Although continued lobbying against lesbians, gay men, and bisexuals continued throughout the 1980s, the second wave arguably received its current impetus with a 1988 Oregon initiative to overturn an executive order forbidding discrimination on the basis of sexual orientation in the executive branch of state government.¹¹¹ This second wave is being led by conservative religious organizations that are conducting sophisticated campaigns using sensationalistic videos and quoting allegedly scientific data, relying heavily upon a person expelled from professional associations for ethical violations.¹¹² As has been

legislation onto or off the statute books," but the increased role of the courts in ruling on the constitutionality of such measures would appear to provide a protection against the dangers of such actions with respect to questions of civil liberties and civil rights.

Lee, *supra* note 36, at 118 (footnote omitted).

¹⁰⁸ Eule, *supra* note 21, at 1554 (citing numerous scholars who have studied the direct democracy process).

¹⁰⁹ The repeal of the Dade County ordinance sparked similar repeals in St. Paul, Minnesota, Wichita, Kansas, and Eugene, Oregon. Bell, *supra* note 44, at 18 & n.71; see also St. Paul Citizens for Human Rights v. City Council, 289 N.W.2d 402 (Minn. 1979).

¹¹⁰ Shortly following the campaign in Dade County, the Florida legislature amended its adoption statute to prohibit homosexuals from adopting children. This statutory section, which was recently upheld in a unanimous en banc decision by the Second District Court of Appeal of Florida, is currently on appeal to the Florida Supreme Court, which has accepted jurisdiction. Cox v. Health and Rehabilitative Services, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993), review granted, 637 So. 2d 234 (Fla. 1994).

¹¹¹ This measure was overturned in Merrick v. Board of Higher Educ., 841 P.2d 646 (Or. App. 1992). The court held that the initiative violated the free expression clause of the Oregon Constitution.

¹¹² See, e.g., Smith, *supra* note 4, at 368-69; Note, *supra* note 86, at 1909. Both commentators discuss the use of a video tape currently being used in campaigns around the country, entitled *The Gay Agenda*, which splices together the most outrageous footage from gay pride parades. The latter also quotes from some Colorado literature which argues that

noted above, proponents of these measures have at least ten states targeted for the 1994 general election.¹¹³

V. LEGAL PROBLEMS WITH CURRENT ANTI-GAY INITIATIVES

A. *The Constitutional Arguments*

This section will identify some of the most common arguments utilized on behalf of lesbians, gay men, and bisexuals in areas of the law concerning discrimination. It will not address all of the possible constitutional arguments, such as the right to privacy, but will instead address those which seem most relevant and likely to be successful with ballot propositions. A number of other commentators have addressed these issues more exhaustively, and therefore the arguments will be discussed only briefly here.¹¹⁴ Further, because state constitutions may be amended through an initiative or referendum, state constitutional arguments will not be separately addressed.¹¹⁵

1. *First Amendment Arguments*

Some have argued that anti-gay ballot measures should fall under traditional First Amendment claims of free speech and associational liberty.¹¹⁶ It has also been argued that the measures should fail because they interfere with the right to petition the government for grievances.¹¹⁷ Perhaps the most

gays "incorporate children into their sexual practices" and engage in sexual behaviors which include ingesting feces and urine. The scientist most commonly relied upon in these campaigns, Paul Cameron, has been dropped from both the American Psychological Association and American Sociological Association for misrepresenting data. David Colker, *Statistics in "Gay Agenda" Questioned*, L.A. TIMES, Feb. 22, 1993, at 16A.

¹¹³ See *supra* note 2.

¹¹⁴ See, e.g., Fischer, *supra* note 21, at 66-69 (discussing due process and vagueness problems); William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495 (1994); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

¹¹⁵ If, for example, the proposed amendment did not explain the impact that the measure would have on the state constitution, state constitutional arguments would be relevant for ballot summary and title purposes. These issues will be discussed below. See *infra* notes 159-61, 167-75, 179-90 and accompanying text.

¹¹⁶ Niblock, *supra* note 13, at 156; Note, *supra* note 86, at 1919-22.

¹¹⁷ See Idaho Att'y. Gen. Op. No. 93-11, at 26 n.5 (Nov. 3, 1993) (citing *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 n.9 (Cal. Ct. App.

persuasive argument, however, is raised by Professor David A.J. Richards, who argues that these initiatives and referenda violate the liberty of conscience protected by the First Amendment.¹¹⁸ Professor Richards expresses this violation as a "constitutionally forbidden sectarian religious intolerance [through public law] against fundamental rights of conscience, speech, and association of lesbian and gay persons. . . ."¹¹⁹ Pointing out the religious-based intolerance of the proponents of these amendments, the irrationality of many of their assertions, and the history of recognizing the right of conscience to include such even when it is not based upon theistic forms, Professor Richards compellingly asserts that these measures promote constitutionally invidious religious intolerance.¹²⁰ It is his assertion, which this author supports, that this theory underlies the other constitutional arguments presented.¹²¹

2. Republicanism

Some commentators have asserted that direct democracy poses a threat to this country's republican form of government.¹²² As noted elsewhere, the United States Supreme Court has refused to apply the Guarantee Clause¹²³ on the theory that it raises nonjusticiable political questions.¹²⁴ Nevertheless, the state courts are not foreclosed from doing so. In fact, former Oregon Supreme Court Justice Hans Linde argues that courts should disapprove of the anti-gay ballot propositions precisely because they violate the principles of republicanism ensured by this constitutional provision.¹²⁵ Justice Linde

1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

¹¹⁸ David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491 (1994).

¹¹⁹ *Id.* at 493.

¹²⁰ *Id. passim.*

¹²¹ *Id.* at 493.

¹²² Slonim & Lowe, *supra* note 27, at 192-94. Professor Seeley notes this concern when he states: "A fear of direct democracy has often been characterized as the moving force of the Constitutional Convention, and the entire idea of republican or representative government was a product of that apprehension; one need only examine the convention debates for myriad references contrasting democracy with republicanism." Seeley, *supra* note 53, at 905.

¹²³ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."); see *Baker v. Carr*, 369 U.S. 186, 209-10 (1962).

¹²⁴ See *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (refusing to overturn a tax measure enacted by initiative).

¹²⁵ Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The*

proposes a five-part test to eliminate ballot measures that arouse collective passions¹²⁶ in a manner that should not be permitted through the ballot measure process.¹²⁷ A number of the delegates to the Federal Constitutional Convention spoke against direct democracy, including James Madison as one of the strongest critics. Madison spoke repeatedly about these dangers throughout *The Federalist*.¹²⁸ Noting the dangers of the majority oppressing a minority, he stated, "[i]t is much more to be dreaded that the few will be unnecessarily sacrificed to the many."¹²⁹ A representative government was selected over a direct democracy, in part, to ensure proper respect for the rights of the minority.¹³⁰ Professor Seeley has argued that language in *Baker v. Carr*¹³¹ and

Campaign Against Homosexuality, 72 OR. L. REV. 19 (1993).

¹²⁶ Linde categorizes collective passions as those feelings which undercut collective action through the appeal to groups by national, racial, ethnic, or tribal loyalties and inherited hatreds, or by a shared sense of religious truth or moral outrage. He quotes former Oregon Attorney General Dave Frohnmayer, who criticized "the growth of a politics based upon narrow concerns, rooted in the exploitation of divisions of class, cash, gender, region, ethnicity, morality and ideology—a give-no-quarter and take-no-prisoners activism that demands satisfaction and accepts no compromise." *Id.* at 32.

¹²⁷ Linde posits the following types of measures which are impermissible:

1. Initiatives that refer to any group of individuals in pejorative or stigmatizing terms or, conversely, in terms that exalt one group over other members of the community.
2. Initiatives that avoid emotional, ideological, or sectarian labels but are by their terms directed against identifiable racial, ethnic, linguistic, religious, or other social groups.
3. Initiatives that do not name any targeted group but that are proposed in a historical and political context in which the responsible state officials and judges have no doubt that the initiative asks voters to choose sides for and against such an identifiable group and that it is so understood by the public.
4. Initiatives which appeal to majority emotions to impose values that offend the conscience of other groups in the community without being directed against those groups.
5. Initiatives to place affirmative legislation into the constitution itself, where the measure neither can be amended by the legislature nor tested by judges to stay within limits imposed by the state's constitution.

Id. at 41–43.

¹²⁸ See THE FEDERALIST Nos. 10, 51 (James Madison).

¹²⁹ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 JEFFERSON PAPERS 2 (J. Boyd ed., 1945) (quoted in Slonim & Lowe, *supra* note 27, at 185).

¹³⁰ Slonim & Lowe, *supra* note 27, at 188.

¹³¹ 369 U.S. 186 (1962).

*Reynolds v. Sims*¹³² leaves an opening to argue that referenda used against minority groups should be considered by the courts pursuant to a republican governmental analysis, and he asserts that it is the Guarantee Clause that is most applicable to these ballot measures that seek to restrict the rights of minority groups.¹³³

An argument about plebiscites in general similar to the one above asserts that ballot measures must be allowed, but they must not be permitted to displace the primacy of the representative legislature required by the Guarantee Clause.¹³⁴ Under this analysis, the ballot measure is a check upon the other branches of government. The initiative and referendum serve as an ancillary lawmaking procedure, but not one that displaces the legislative body it is designed to check.¹³⁵ The dilemma is how to keep the ballot measure in this ancillary role.

3. *Equal Protection Analysis*

Some courts have recently recognized that anti-gay ballot measures violate a right of political participation under the Equal Protection Clause of the United States Constitution.¹³⁶ These cases rely upon the decisions in *Reitman v. Mulkey*¹³⁷ and *Hunter v. Erickson*.¹³⁸ Whether these cases should be extended to gays and lesbians depends in part upon how one interprets them. Because the Court refused to extend the reasoning in these cases to indigent persons in

¹³² 377 U.S. 533 (1964).

¹³³ Professor Seeley states:

A system that subjects pro-minority group legislation already passed by representative government to approval by absolute majority vote is similarly an obvious denial of a republican form of government. It is not representative at all, and it subjects the minority to exactly the kind of capriciousness that the guarantee clause was intended to prevent.

. . . The implication [from *Reynolds*] is that where the issue is not political, and where there is no clear absence of a manageable standard, guarantee clause claims may be treated by the courts.

Seeley, *supra* note 53, at 909-10 (citations omitted).

¹³⁴ Sirico, *supra* note 1, at 650-77.

¹³⁵ *Id.* at 654-55.

¹³⁶ Equality Found. of Greater Cincinnati v. City of Cincinnati, No. C-1-93-773, 1994 U.S. Dist. LEXIS 11444 (S.D. Ohio Aug. 9, 1994); *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

¹³⁷ 387 U.S. 369 (1967).

¹³⁸ 393 U.S. 385 (1969).

James v. Valtierra,¹³⁹ some would argue that the earlier cases were decided based upon racial discrimination. In *James*, the Court refused to overturn a voter initiative that required special local referenda to approve low-income public housing projects. Others would argue that the case stands for the proposition that indigent persons do not constitute an identifiable group that the Court chooses to recognize.¹⁴⁰ In *Gordon v. Lance*,¹⁴¹ the Court again mentioned the concept of protecting identifiable groups when it upheld a voting plan in West Virginia that required a three-fifths vote to pass bond issues, noting that *Hunter* was not applicable because the Court could not identify any discernible group of persons who favored bond indebtedness over other types of financing.¹⁴² Justice Stevens has attempted to provide guidelines for identifiable groups in *Karcher v. Daggett*,¹⁴³ by noting that they may include those "politically salient groups"¹⁴⁴ whose "common interests are strong enough to be manifested in political action."¹⁴⁵ The Court has also indicated that a political group could be protected by the Equal Protection Clause if it were unfairly disadvantaged in the political process.¹⁴⁶

Some commentators have argued that lesbians, gay men, and bisexuals are entitled to suspect class protection.¹⁴⁷ To date, this approach, for the most part, has been unsuccessful in the courts.¹⁴⁸ This lack of success should not be surprising because of the tests that courts have used to determine if a group deserves suspect class status. As Professor Richards has argued, at least two of the tests defy rational analysis, even when applied to groups recognized as

¹³⁹ 402 U.S. 137 (1971).

¹⁴⁰ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-58, at 1666-67 (2d ed. 1988).

¹⁴¹ 403 U.S. 1 (1971).

¹⁴² *Id.* at 5.

¹⁴³ 462 U.S. 725 (1983) (Stevens, J., concurring).

¹⁴⁴ *Id.* at 754.

¹⁴⁵ *Id.* at 750 (quoting *Mobile v. Bolden*, 446 U.S. 55, 88 (1980) (Stevens, J., concurring)).

¹⁴⁶ *Davis v. Bandemer*, 478 U.S. 109 (1986) (rejecting a claim that a redistricting scheme discriminated against democrats because there was insufficient proof of discriminatory effect).

¹⁴⁷ Niblock, *supra* note 13, at 167-71.

¹⁴⁸ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). *But see* *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988) (holding that homosexuals constitute a suspect class for purposes of equal protection analysis), *cert. denied*, 498 U.S. 957 (1990).

suspect classes.¹⁴⁹ The test of political powerlessness not only defies measurement, it implies that a group could lose suspect class status once this powerlessness is overcome.¹⁵⁰ Further, Professor Richards and Professor Janet Halley both argue that the immutability argument is one that lesbians, gays, and bisexuals should avoid.¹⁵¹ Although recent scientific evidence supports the theory that sexual orientation is not chosen,¹⁵² there remains dispute over this issue.¹⁵³ If this argument is ultimately to succeed, the underlying justifications for suspect class status must be reconceptualized.¹⁵⁴

There is also an argument asserted by some legal commentators that

¹⁴⁹ See Richards, *supra* note 118, at 499–508.

¹⁵⁰ *Id.* at 500–01.

¹⁵¹ Professor Richards believes this argument “falsely and malignantly reduces to biological terms what is essentially a principled argument for the just ethical emancipation of the moral powers of conscience of lesbian and gay persons in terms that subvert its emancipatory potential.” *Id.* at 507; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

¹⁵² Halley, *supra* note 151, at 531–45.

¹⁵³ *Id.* at 507–28; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 540 n.139 (1992). Professor Daniel Ortiz discusses the current debate among lesbian and gay historians and scholars concerning the contemporary lesbian and gay subculture. At the risk of oversimplifying this debate, it is roughly a disagreement between essentialists, who believe persons with a lesbian or gay identity have always existed, although their identity has been suppressed by societal forces, and constructivists, who argue that this identity is a relevantly recent phenomenon, which is a result of historical and cultural forces that coerce people to label sexual feelings and behaviors so that a separate subculture is developed. Daniel Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993).

¹⁵⁴ Professor Richards argues for such classification based upon First Amendment principles for lesbians and gay men. The classification would include a group who is subjected to a “rights-denying culture of irrational political prejudice,” a prejudice that “assigns intrinsically unreasonable weight to and burdens on identifications central to moral personality.” Richards, *supra* note 118, at 503. He sets out three factors in his suspect class analysis for lesbians and gay men:

- (1) a history and culture of unjust moral subjugation of homosexuals, (2) the political legitimation of such subjugation by the exclusion of homosexuals from the constitutional community of equal rights in the unreasonable way that gives rise to intolerance and the irrational political prejudice of homophobia, and (3) the sectarian religious expression of such prejudice against the conscientious claims of lesbian and gay persons to justice in public and private life.

Id. at 509.

discrimination on the basis of sexual orientation is simply a form of gender discrimination.¹⁵⁵ This analysis posits that discrimination occurs because of the gender of one's sexual partner. Professor Marc Fajer draws upon the miscegenation cases to support his argument that current constitutional law should suffice to overturn measures which discriminate on the basis of sexual orientation.¹⁵⁶ Professor Sylvia Law has also gathered an impressive array of historical and sociological data to support her argument that sexual orientation discrimination is grounded in gender discrimination.¹⁵⁷

B. Procedural Objections to Current Anti-Gay Proposals

1. Overtly Hostile Amendments

Initiatives such as those rejected in Oregon and proposed in Washington and Nevada raise numerous legal problems. The restrictions on the teaching about homosexuality or allowing children access to books that provide scientific explanations in libraries about homosexuality raise serious First Amendment concerns.¹⁵⁸ In addition, they raise technical problems of some severity. First, they clearly cover a number of subjects and should be rejected on single subject grounds. A voter could be opposed to the restrictions on libraries and schools, but vote for the measure because of support for the restriction on civil rights protections of the targeted groups. Such a problem is a classic example of logrolling.¹⁵⁹

Even more serious is the failure of the measures to correctly explain their purpose. Although it is unknown what, if any, summary will accompany some of these measures on the ballot, the language of the proposals themselves confuse and confound a number of subjects, misleading the voters in the process. First, the reference to "minority status" is a legally meaningless

¹⁵⁵ Fajer, *supra* note 153; Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

¹⁵⁶ Fajer, *supra* note 153, at 634-38.

¹⁵⁷ Law, *supra* note 155, at 188-206.

¹⁵⁸ Board of Union Free Sch. Educ. v. Pico, 457 U.S. 853, 871 (1982) (holding public libraries must not remove books to suppress ideas); Widmar v. Vincent, 454 U.S. 263 (1981) (holding state must show compelling interest to justify discriminatory exclusion from public forum); Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 599 (1966) (upholding academic freedom).

¹⁵⁹ Although reversed by an appellate court, a trial court in Oregon held that a proposed measure violated Oregon's single subject requirement. Lowe v. Keisling, No. 93C-11972 (Marion County Cir. Ct. Apr. 8, 1994), *rev'd*, No. CA-A84110, 1994 Ore. App. LEXIS 1345 (Or. Dist. Ct. Sept. 1, 1994).

categorization as recognized by the Idaho Attorney General.¹⁶⁰ Appealing to the prejudices of those opposed to the advancement of persons who have characteristics that cause them to be unfairly discriminated against, the label "minority status" ignores the legal reality that antidiscrimination laws protect all persons against wrongful discrimination. The civil rights statutes obviously do not protect only women or persons of color, but any person discriminated against because of his race or gender. However, the misleading attempt to portray these measures as "special rights" meant to promote "minority groups" is the central thrust of these measures.¹⁶¹ The constitutional analysis applied to the targeted measures covered in the next section is also applicable to these proposals.¹⁶²

2. Targeted Groups Measures

As noted above, the constitutional problems of these measures have been recognized by three courts pursuant to an Equal Protection analysis. The Colorado Supreme Court has preliminarily enjoined the enforcement of Amendment Two.¹⁶³ On November 16, 1993, the voters of Cincinnati passed a similar measure which sought to limit protections for persons on the basis of sexual orientation, conduct, or relationships.¹⁶⁴ A federal district court has also

¹⁶⁰ *ACLU v. Echohawk*, 857 P.2d 626, 629 (Idaho 1993).

¹⁶¹ *See, e.g.*, COLO. CONST. art. II, § 30b (Colorado's Amendment Two); *see supra* notes 13-14 and accompanying text.

¹⁶² *See infra* part V.B.2.

¹⁶³ *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

¹⁶⁴ Issue Three proposed:

NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

CHARTER OF THE CITY OF CINCINNATI art. XII. *See infra* Appendix I for a reproduction of Issue Three. *See also* Equality Found. of Greater Cincinnati v. City of Cincinnati, No. C-1-93-773, 1994 U.S. Dist. LEXIS 11444, at *7 (S.D. Ohio Aug. 9, 1994).

entered a permanent injunction against this measure.¹⁶⁵ The City Council of Riverside, California refused to place a proposed ordinance prohibiting antidiscrimination protection for persons with AIDS and homosexuals on the ballot. A California appellate court upheld this refusal in *Citizens for Responsible Behavior v. Superior Court*,¹⁶⁶ finding that the measure lacked a rational basis. Although the court discussed the deference to be given the initiative process, it also recognized that such deference was not to be determinative.¹⁶⁷ The court was particularly critical of the notice accompanying the petition, which indicated that recognizing the rights of gays and lesbians would end in child molestation, prostitution, and child pornography. Unfortunately, the attempts to use procedural protections against these measures have met with mixed success. The technical problems with the overtly hostile proposals are also present with those that attempt to target lesbians, bisexuals, and gay men. They also refer to "minority status" and "special rights." They are perhaps more palatable politically, but not legally.

In a case dealing with the description given to a petition during the signature-gathering stage, the Alaska Supreme Court held that a municipal referendum petition, which attempted to repeal the sexual orientation clause of its public employer and municipal contractor law, had a misleading title: "Referendum Petition to Repeal A 'Special Homosexual Ordinance.'"¹⁶⁸ The court held that the referendum petition, by referring to the law as a special ordinance, clearly mischaracterized the ordinance in a biased and partisan way.¹⁶⁹ As noted by the court, the mischaracterization of the proposition brings

¹⁶⁵ *Equality Found. of Greater Cincinnati*, 1994 U.S. Dist. LEXIS 11444, at *1.

¹⁶⁶ 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

¹⁶⁷ The court stated:

Invalidity, like pregnancy admits of no half-measures. If an ordinance proposed by initiative is invalid, routine deference to the process will often require the charade of a pointless election. . . . But if the court is convinced, at any time, that a measure is fatally flawed, it should not matter whether the decision is easy or difficult, simple or complicated. Certainly it would be unconscionable for this court, at this time, to rule in favor of petitioner on the basis that the issue is close—only to be faced with a post-election challenge should the measure pass.

Id. at 652-53.

¹⁶⁸ *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214 (Alaska 1993).

¹⁶⁹ *Id.* at 1218. Of additional significance in this case is the fact that the Alaska Supreme Court required this impartiality even though the municipal charter for Anchorage merely required that the petition must describe the ordinance or resolution sought. The dissent in the case found this construction troubling. In addition, the dissent faulted the

about general opposition to it, causes the signature requirement to be too readily overcome and thus thwarts the intended screening function of that requirement.¹⁷⁰

Comparing the Alaska decision with the Idaho Supreme Court's ruling on the titles of Idaho's anti-gay initiative demonstrates the difficulty in trying to find a guiding principle in such cases.¹⁷¹ In the latter case the ACLU pointed out that the titles¹⁷² failed to define the terms "homosexual behavior" and "minority status," the latter of which the Idaho Attorney General had certified was not a status upon which any special benefits were conferred.¹⁷³ In addition, the restriction on same-sex marriages did not indicate whether it modified domestic partnerships.¹⁷⁴ The court unfortunately glossed over these definitional shortcomings by essentially refusing to discuss them.¹⁷⁵ These two cases exemplify the problem of trying to find a consistent application of the principle of mischaracterizing titles and labels.¹⁷⁶ Whereas one court finds the term "special" to mislead, another permits ambiguous terms to go undefined and permits the usage of one term without legal meaning to remain in a measure which implies, by its context, that it does have a particular legal significance.

There is also inconsistency in the rulings concerning state officials who are empowered to assist in the ballot measure process. The attempt of a state official to fulfill his duties in Maine resulted in a successful challenge under 42 U.S.C. § 1983.¹⁷⁷ In this case, the Secretary of State for Maine refused to release petitions to citizens seeking an initiative to require the legislature to receive voter approval for any legislation providing antidiscrimination legislation for homosexuals. The refusal was based upon his belief that the initiative was unconstitutional. Not only did the court find his action improper,

majority for failing to distinguish between the description required for a summary for the ballot as opposed to the petition itself and for not lowering the standard for a description of an initiative as opposed to a referendum. *Id.* at 1221-25 (Moore, C.J., dissenting).

¹⁷⁰ *Id.* at 1219-20.

¹⁷¹ *ACLU v. Echohawk*, 857 P.2d 626 (Idaho 1993).

¹⁷² What other states call a summary, Idaho designates as a long title.

¹⁷³ *ACLU*, 857 P.2d at 629.

¹⁷⁴ *Id.*

¹⁷⁵ For a discussion of the ambiguity of the meaning of the terms "homosexual" and "homosexual behavior," see Fajer, *supra* note 153, at 533-44, and Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799 (1979).

¹⁷⁶ See also *Mabon v. Keisling*, 856 P.2d 1023 (Or. 1993); *deParrie v. Keisling*, 862 P.2d 464 (Or. 1993). In *deParrie*, the Oregon Supreme Court struggled to develop acceptable title and summary to a long and complex anti-gay ballot initiative.

¹⁷⁷ See *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993).

but also it held that he had violated the First Amendment rights of the petitioners. The decision in this case could be seen as striking down an improper exercise of executive authority, because the Secretary made a decision more appropriate for the judiciary, but the court's refusal to seriously consider the constitutional issues is troubling. Compare this decision to *Citizens for Responsible Behavior*,¹⁷⁸ in which the court upheld the city council's refusal to submit a ballot proposition to the electorate.

3. *Stealth Measures*

The technical problems with stealth initiatives were addressed by the Florida Supreme Court in *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*.¹⁷⁹ The court rejected proponents' attempt to characterize the proposal as simply being about "discrimination."¹⁸⁰ The court noted that the amendment encroached upon municipal home rule powers,¹⁸¹ the rulemaking authority of executive agencies and the judiciary,¹⁸² Florida's equal protection clause,¹⁸³ and the portion of the Florida Constitution which deals with employee collective bargaining rights.¹⁸⁴ The court also noted that the enumeration of ten classes of people who would be protected by the proposal actually encompassed ten questions but presented them as one.¹⁸⁵

The court also disapproved of the ballot summary prepared by the proponents. The court noted that the summary and text of the amendment omitted mention of the "myriad of laws, rules, and regulations that may be affected by the repeal of 'all laws inconsistent with this amendment.'"¹⁸⁶ In addition, the court disapproved of the amendment's failure to explain that the proposal restricted the power of governmental entities by preventing them from adopting laws in the future to protect groups from discrimination.¹⁸⁷ Although the court did not expound on the myriad of laws threatened by this amendment, the opponents of the amendment explained the effect in their brief. They argued

¹⁷⁸ *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

¹⁷⁹ 632 So. 2d 1018 (Fla. 1994).

¹⁸⁰ *Id.* at 1020.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* (citing FLA. CONST. art. I, § 2).

¹⁸⁴ *Id.* (citing FLA. CONST. art. I, § 6).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1021.

¹⁸⁷ *Id.*

that the failure to define "discrimination," "right," "privilege," "protection," "characteristic," "trait," "status," or "condition" would possibly threaten dozens of statutes which provided any kind of benefit or right based upon any characteristic, trait, status, or condition.¹⁸⁸ Thus, the opponents suggested that statutes that provided benefits to veterans, homestead property tax exemptions for residents, and tuition preferences for state residents attending state universities were subject to repeal.¹⁸⁹

The court did not address another argument raised by the opponents: that the measure and its summary were affirmatively misleading because they failed to inform the voters of the measure's central purpose—to restrict the rights of lesbians, gay men, and bisexuals.¹⁹⁰ This is particularly troubling since neither the amendment nor its summary ever mentions sexual orientation or uses the terms gay, lesbian or bisexual.¹⁹¹ It is interesting to note that the decision of the court also fails to mention any of these terms. The proponents of measures in this category should be forced to tell the voter what the central purpose of a

¹⁸⁸ Brief for Florida Public Interest Law Section, Florida AIDS Legal Defense & Education Fund, Florida Association of Women Lawyers, Florida Legal Services, Inc., Floridians Respect Everyone's Equality, Floridians United Against Discrimination, Miami Area Legal Services Union, National Lesbian & Gay Lawyers Association, National Organization for Women (Florida Chapter), People for the American Way, Southern Poverty Law Center, and United Teachers of Dade Gay & Lesbian Caucus at 13-14, *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) (No. 82-674).

¹⁸⁹ *Id.* at 15.

¹⁹⁰ *Id.* at 11-13.

¹⁹¹ Interestingly, the proponents of the amendment, in spite of their continued attacks upon gays, lesbians, and bisexuals, also attempted to avoid the issue in their legal arguments. In response to briefs, which alleged that the true purpose of their amendment was to target lesbians, gay men, and bisexuals, they offered the following cryptic response:

The Brief for Interested Party American Civil Liberties Union Foundation of Florida, Inc. objects to the ballot title and summary, claiming that the "true meaning" of the proposed amendment is "unstated." Stripped of its veneer, this claim is nothing more than an objection that the interpretation of secret purpose concocted by ACLU is not reflected in the title or summary.

Reply brief for American Family Political Committee of Florida, In Support of Determination of Compliance with Section 3, Article XI, Florida Constitution, and Compliance with Florida Stat. Section 101.161 at 10, *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) (No. 82-674). Not only was the purpose of the amendment not secret to those who saw the AFPC's mailings, the AFPC never identified any other group to the court or in its campaign other than lesbians, gay men, and bisexuals.

measure is: in this case, restricting the rights of gay men, lesbians, and bisexuals.

The court declined to address the constitutional issues because the statute authorizing the advisory opinion explicitly authorizes consideration only of the procedural issues.¹⁹² The constitutional difficulties of these measures should be recognized to be the same as those of other measures. The failure to identify the targeted group in the initiative should be no more of an excuse than it was in *Reitman*¹⁹³ or *Hunter*.¹⁹⁴

VI. PRE- AND POSTELECTION CHALLENGES

A. Legal Barriers to Pre-Election Challenges

It is arguable that the barriers for measures that deal with constitutional issues should be higher than with those that deal with statutes or ordinances because of the importance of the constitutional process.¹⁹⁵ Some have argued that substantive pre-election challenges are improper because they involve the rendering of an advisory opinion, they raise constitutional issues that could be avoided, and they interfere with the legislative process.¹⁹⁶ Some state courts also refuse to decide constitutional issues in a pre-election challenge.¹⁹⁷

Courts have traditionally refused to issue advisory opinions.¹⁹⁸ Such

¹⁹² See FLA. STAT. ANN. § 101.161 (West 1982).

¹⁹³ *Reitman v. Mulkey*, 387 U.S. 369 (1967); see *supra* notes 136–46 and accompanying text.

¹⁹⁴ *Hunter v. Erickson*, 393 U.S. 385 (1969); see *supra* notes 136–46 and accompanying text.

¹⁹⁵ See, e.g., *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). The court found: “[W]e should require strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature.” *Id.* at 989. The court removed from the ballot a measure which sought to restrict the taxing ability of local governments because it violated the single-subject requirement. *Id.*

¹⁹⁶ See *Gordon III & Magleby*, *supra* note 1; see also *Plugge v. McCuen*, 841 S.W.2d 139 (Ark. 1992) (refusing to rule on the constitutionality of a term limit constitutional amendment prior to the election).

¹⁹⁷ See, e.g., *In re Advisory Opinion to Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994); cf. *Brosnahan v. Eu*, 181 Cal. Rptr. 100, 101 (Cal. Ct. App. 1982) (“As we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people’s franchise, in the absence of some clear showing of invalidity.”).

¹⁹⁸ See *Muskraat v. United States*, 219 U.S. 346, 362 (1911).

reticence is based in part upon the notion of the separation of powers and the requirement of a case or controversy.¹⁹⁹ Advisory opinions also are criticized for lacking a factual record, the essence of which promotes abstract, general decisions.²⁰⁰ They also violate the doctrine of strict necessity, which discourages courts from reaching constitutional questions unless they are unavoidable.²⁰¹ There can also be time pressures in pre-election challenges because some measures reach the court shortly before an election.²⁰² Some would argue that pre-election reviews of a ballot measure are similar to a review of a bill prior to its passage by the legislature²⁰³ or that they foster antijudicial sentiment.²⁰⁴ The doctrine of ripeness is also raised as an argument to avoid pre-election reviews of measures.²⁰⁵ The doctrine prevents review when future facts may arise that would make the adjudication inapplicable. In pre-election challenges, the most commonly raised argument is that review may not be necessary because the measure may not pass. There are also questions about the manner in which a measure may be enforced even if it is passed.²⁰⁶

B. *The Need for Higher Scrutiny for the Initiative Process*

Some courts have stated that the initiative process means that the procedural requirements must be adhered to more stringently.²⁰⁷ The process is not subject to gubernatorial vetos, giving the proponents of these measures more power than the legislative branch of government. They also lack the inherent checks placed in the legislative process. For example, the check inherent in a bicameral legislative process forces a measure to survive legislative staff reviews, public hearings, and rigorous debate within two separate legislative bodies before passage.²⁰⁸ Various courts have discussed this "filtering process," which is missing in initiative measures.²⁰⁹ The lack of these filters contributes to the number of propositions which are poorly drafted

¹⁹⁹ See Gordon III & Magleby, *supra* note 1, at 305.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See, e.g., *Askew v. Firestone*, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J., concurring).

²⁰³ See Gordon III & Magleby, *supra* note 1, at 308.

²⁰⁴ *Id.* at 306.

²⁰⁵ *Id.* at 309-10.

²⁰⁶ *Id.* at 310.

²⁰⁷ See, e.g., *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

²⁰⁸ See Gordon III & Magleby, *supra* note 1, at 300.

²⁰⁹ See, e.g., *Fine*, 448 So. 2d at 988.

and difficult to understand.²¹⁰ In spite of these problems, some would argue that courts are still too deferential to ballot measures.²¹¹

Professor Lynn Baker has argued that direct democracy should be subject to no higher scrutiny than matters approved by elected officials, using public choice theory to support her thesis.²¹² Professor Baker concludes that because it is difficult to empirically demonstrate systemic superiority between direct and representative democracy, one should refrain from utilizing *a priori* reasoning to impose higher burdens upon ballot measures. Because courts have struck down measures aimed at racial minorities, she concludes that heightened scrutiny is unnecessary for referenda and initiatives.²¹³ Her suggestion to remedy any defects is to either strengthen the doctrine of substantive review of the legislative product²¹⁴ or to remedy defects in plebiscitary procedures.²¹⁵

It is not necessary to address Professor Baker's arguments point by point because Professor Eule has done that in a responsive article,²¹⁶ but certain points of relevance will be repeated and expanded upon here. First, as Professor Eule notes, it is not necessary to empirically prove the preference for representative government because that is the form of government chosen by the United States Constitution,²¹⁷ as well as by all fifty states. The inability to conclusively demonstrate on an empirical basis that plebiscites pose threats to members of minority groups should not foreclose the ability of scholars and courts to recognize that which they observe.²¹⁸ Second, it is disingenuous to

²¹⁰ See Fischer, *supra* note 21, at 54.

²¹¹ See, for example, *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), in which the Florida Supreme Court stated that: "The Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Id.* at 156. The court upheld an amendment to the "Sunshine" (public disclosure) provisions of the Florida Constitution. Note that this is the same court that proclaimed in *Fine* that the initiative process should be subjected to higher scrutiny. See *Fine*, 448 So. 2d at 989.

²¹² See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991).

²¹³ *Id.* at 759-66.

²¹⁴ *Id.* at 770.

²¹⁵ *Id.* at 772-75.

²¹⁶ See Julian N. Eule, *Representative Government: The People's Choice*, 67 CHI.-KENT L. REV. 777 (1991).

²¹⁷ *Id.* at 778.

²¹⁸ In concluding his article on plebiscites, Professor Sirico observes:

Reasonable people, however, continue to disagree over the advisability of permitting plebiscites. Social science studies suggest no clear resolution to the controversy. Nor do legal arguments that rely on judicial doctrine, inconclusive behavioral data, and speculation on how certain structures may further

imply that the dangers to minority groups are simply the elitist musings of legal academicians. As noted, most of those who have studied the initiative process have noted the dangers to members of minority groups.²¹⁹ Of the 139 jurisdictions which presently have sexual orientation antidiscrimination provisions, the author is unaware of any which were obtained through the initiative process. The empirical proof may not be conclusive, but the anecdotal evidence is overwhelming.

The argument for heightened scrutiny of ballot measures does not depend upon an uncritical acceptance of representative government. Gay, lesbian, and bisexual leaders have recognized that it simply takes fewer persons and resources to present to the limited number of elected officials necessary to pass legislation the significant scientific evidence and personal testimony necessary to refute emotional, unsupported stereotypes than it is to try to do the same for millions of voters. In modern elections, which are increasingly conducted with thirty- and sixty-second "sound bites," it is often not possible to convey the complex and extensive documentation that counters the propaganda of the proponents of the anti-gay measures.

Further, the opponents of the anti-gay measures certainly believe that the representative process is more prone to passing such legislation. This belief is evidenced by their efforts to prohibit legislative bodies from passing such legislation in the future.²²⁰ Anti-gay measures do not simply attempt to compete with elected officials on an equal basis; they seek to remove elected officials from the process of considering the issue. In fairness to Professor Baker, it is not completely clear that she would approve of submitting the current anti-gay measures to a vote. She may believe that current substantive judicial review doctrine is sufficient to eliminate them. At least on the pre-election cases, however, the judicial review process has rendered mixed results.²²¹ Courts continue to express grave concern about overturning ballot measures.²²²

constitutional and political ideals. *The answer must find its source in intuition informed by experience.*

Sirico, *supra* note 1, at 676-77 (emphasis added).

²¹⁹ See *supra* part IV.A.

²²⁰ See *infra* Appendices A-J.

²²¹ See *supra* notes 171-76 and accompanying text.

²²² See *supra* note 22.

C. *The Arguments for Pre-Election Challenges to Anti-Gay Ballot Measures*

The legal problems, including those of constitutional dimensions that were outlined above,²²³ should prevent these ballot propositions from being given legal effect. The weakest arguments for challenges to referenda exist for those which are placed on a ballot by a representative body, because they have already faced a legislative process and thus, have gone through the systemic checks of that process. Nevertheless, this factor still should not get the ballot propositions past the significant constitutional hurdles that they should be forced to overcome. In addition to the First Amendment and Equal Protection arguments which exist against referenda, it can be argued that the dangers posed to minorities by direct democracy should suffice to sustain an argument against them even on the basis of republicanism concepts.²²⁴

Initiatives lack even the defense that they were filtered through the legislative process. They realize the worst fears of critics and those supporters of ballot measures who recognize the weaknesses of these plebiscites. These propositions should be struck down on either republicanism, Equal Protection, or First Amendment grounds. The portions of overtly hostile measures concerning public schools and libraries also should be struck down because of the particular First Amendment issues that they raise.

As noted above, there are at least three separate constitutional arguments that can be made against anti-gay ballot initiatives.²²⁵ On Guarantee Clause grounds, Justice Hans Linde has proposed a five-part test which should be employed to determine when a ballot measure violates republican jurisprudence and therefore needs to be invalidated.²²⁶ Professor Bell has posited a four-part test to determine when a measure deserves more scrutiny.²²⁷ He argues that the

²²³ See *supra* part V.A.

²²⁴ See *supra* part V.A.2.

²²⁵ See *supra* part V.A.

²²⁶ Linde, *supra* note 125, at 41-43.

²²⁷ Professor Bell suggests that courts consider:

- (1) the history of overt or institutional discrimination to which the minority group has been subjected;
- (2) the degree to which the minority group continues to suffer from discrimination;
- (3) whether the referendum action increases the difficulty minorities will experience in overcoming past and/or present discrimination; and
- (4) whether the neutral goals sought to be achieved by the referendum could have been achieved through policies less harmful to minority interests.

court protection should be strongest when the majority attempts to take away through the ballot a gain obtained through the representative process.²²⁸ The California,²²⁹ federal,²³⁰ and Colorado²³¹ courts, which have found Equal Protection violations, have established the groundwork for those claims. Further, Professor Richards would strike all of these measures because they violate First Amendment principles.²³² For those states that do not have specific pre-election technical review procedures, the courts should provide a stricter scrutiny on the substantive issues to compensate for the lack of the filtering process which the legislative process provides.

Those courts that refuse constitutional review prior to an election should nonetheless carefully review both referenda and initiatives for procedural and textual defects. As has been noted, the proponents of these measures are attempting to find the language that is most effective in a campaign. Their demonstrated willingness to use words to manipulate emotions should demand the strictest scrutiny of their text, titles, and summaries.²³³ The right of a person to not be subjected to discrimination should not depend upon the ability of a pollster or other campaign strategist to devise the most emotionally appealing phrase to convince the voters. Stealth proposals must be revealed for what they are. The Florida Supreme Court has provided some guidelines for the approach to be taken to these measures in *In re Advisory Opinion to the Attorney General—Restricts Law Related to Discrimination*.²³⁴ The interests at stake are too important for voters to have to guess about what they are voting. If all of these standards to assure electoral fairness are not strictly enforced, then the justifications raised for direct democracy are even further eroded.²³⁵

Some would argue that all such remedies can be sought subsequent to an election. However, the reasons for doing so are insufficiently strong to overcome the problems raised by these measures. If a court needs more time to fully consider the issue, it has the discretion to deny that review,²³⁶ although it should exercise this discretion with care. Because of the lack of the structural

²²⁸ *Id.* at 26.

²²⁹ See *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

²³⁰ See *Equality Found. of Greater Cincinnati v. City of Cincinnati*, No. C-1-93-773, 1994 U.S. Dist. LEXIS 11444 (S.D. Ohio Aug. 9, 1994).

²³¹ See *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

²³² See *supra* notes 118-21 and accompanying text.

²³³ See *supra* note 92 and accompanying text.

²³⁴ 632 So. 2d 1018 (Fla. 1994).

²³⁵ See *supra* part III.A.2.

²³⁶ See *Gordon III & Magleby*, *supra* note 1, at 316.

checks built into the legislative process, reviews of these measures are not similar to reviewing bills still in the legislature.

The hesitancy of some commentators to support pre-election review is unwarranted with regard to these anti-gay propositions.²³⁷ Courts render advisory opinions on the procedural defects of ballot measures,²³⁸ and some have even considered constitutional grounds prior to a vote.²³⁹ These measures present the type of palpable, facial constitutional violations that all courts should be willing to address. The information that courts will gain by waiting for an election is insufficient to overcome the damage caused by these unconstitutional proposals. Delaying an inevitable rejection of an unconstitutional measure on the grounds of ripeness unduly favors form over substance. Even an electoral defeat does not stop the proponents of anti-gay proposals, as is evidenced by the continued efforts in Oregon to bring such a measure before the voters.²⁴⁰

Similarly, the facial unconstitutionality of these propositions is not dependent upon factual nuances. Nonetheless, in *Evans v. Romer*,²⁴¹ the Colorado District Court permitted the state to put on evidence to support its arguments of a compelling interest. More appropriate for a legislative proceeding than the type of fact-finding usually done by trial courts, the trial court engaged in an inquiry which was unnecessary to address the facial constitutional problems of this initiative.²⁴²

These measures present a variety of legal defects. As has been noted, even those who have written favorably about direct democracy have assumed that the courts would protect the rights of persons who belong to minority groups.²⁴³ When applied to a politically unpopular minority group, the usual judicial deference given to direct democracy should be abandoned. Even courts that

²³⁷ Even Professor Eule, who favors "a harder look" standard of judicial review of ballot measures, opines that judges should steer clear of pre-enactment review. This is particularly troubling because he acknowledges that postelection challenges pose a greater danger to public acceptance because of the appearance of thwarting the will of the majority. See Eule, *supra* note 21, at 1585.

²³⁸ See *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994).

²³⁹ The Nevada Supreme Court removed an initiative concerning the limitation of terms that a United States Congressman or Senator may serve from the ballot because it violated the Qualifications Clauses of the United States Constitution. *Stumpf v. Lau*, 839 P.2d 120, 126 (Nev. 1992).

²⁴⁰ See *supra* note 5.

²⁴¹ 60 Empl. Prac. Dec. (CCH) ¶ 41,998 (Colo. Dist. Ct.), *aff'd on other grounds*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

²⁴² *Id.*

²⁴³ See *supra* notes 107–08 and accompanying text.

have been reluctant to prevent ballot measures from reaching the voters have acknowledged that clearly defective measures should not be permitted.²⁴⁴

In response to the argument that the judicial system would be subjected to criticism for removing a measure before an election, one should consider the alternatives. If a court strikes a measure passed by the electorate, the criticism of the judicial system certainly will not be less. Going through the charade of an election to pass a measure that cannot withstand legal scrutiny not only wastes time, energy, and other resources, it also mocks the electoral system it supposedly honors. Voters are given the option of either choosing what is constitutionally permissible or having their choice rejected for its illegality. Further, holding these elections has a harmful impact upon those whom the courts should be protecting. The controversy and animosity surrounding these measures has generated violent acts against the groups they target.²⁴⁵ This should not be surprising because the attempt to give discrimination an official sanction simply reinforces the bigoted notion that the persons being denied protection are worthy of the scorn and abuse they receive. Further, when the state for much of its history has been a willing partner in endorsing the discrimination being enacted by the citizenry, it should be diligent in remediating the harm it has caused.²⁴⁶ The judiciary should acknowledge the role it has played in creating the unfair stereotypes that lesbians, gay men, and bisexuals must seek to counter in these campaigns and use its discretion to counter the stereotypes' effects when an appropriate opportunity to do so is presented.²⁴⁷

²⁴⁴ The Florida Supreme Court stated, long before adopting the current advisory opinion procedure to which it subjects all current initiative amendments, that a measure should be struck "when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances." *Gray v. Winthrop*, 156 So. 270, 272 (Fla. 1934). *Cf. Whitson v. Anchorage*, 608 P.2d 759, 762 (Alaska 1980) (noting the initiative right, while closely guarded, does not extend to legislation that violates the United States or Alaska Constitutions); *Hessey v. Burden*, 615 A.2d 562, 574 (D.C. App. 1992) (holding pre-election review of constitutional violations is appropriate in the "truly extreme case").

²⁴⁵ After the passage of Amendment Two, there was a 400% increase in the reports of harassment and violence against gays, lesbians, and bisexuals in Colorado. *See Note, supra* note 86, at 1911-12 & nn. 49-53.

²⁴⁶ *See generally* Patricia A. Cain, *Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1551, 1551-80 (1993); Law, *supra* note 155; Richards, *supra* note 118; Rivera, *supra* note 175; Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81).

²⁴⁷ For an argument of how sodomy laws contribute to homophobic violence, see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992). For a description of the effects of the Utah legislature's discussion of the inclusion of sexual

Measures that seek to prohibit legislative bodies from passing antidiscrimination laws in the future are significantly different from other initiatives. Such initiatives do not simply seek to compete on an equal ground with representative bodies; they seek to explicitly remove the power of the elected officials. These measures turn the notion of republican government on its head. The representative government is prohibited from exerting power to protect its constituents, even if the constituents can demonstrate pervasive and invidious discrimination. As the initiatives' proponents have demonstrated, they wish to remove from the executive and legislative branches of government the power to provide legal protection on these issues. If the judiciary also refuses to get involved, the proponents of these measures will have managed to prevent all three branches of representative government from protecting an unpopular minority. Such a notion should be offensive to the principles embodied by the First Amendment, the Guarantee Clause, and the Equal Protection Clause. It is the realization of the worst fears of the persons who have studied direct democracy and of the founders of this country.

The danger of direct democracy to minority groups is evidenced by the need, twenty-five years into the modern gay rights movement,²⁴⁸ for scholars and advocates to respond to ludicrous charges of child molestation and bizarre sexual practices, such as urine and feces ingestion, offered by these measures' proponents.²⁴⁹ On an issue as important as the right to be free from discrimination, the debate should be principled and based upon rational discussion of theories, data, and facts propounded by reliable sources. The charges leveled by the proponents of these measures about an entire group of persons are a classic example of a bigot trying to stereotype an entire class by making allegations about the most objectionable behavior arguably engaged in by a few members of that class. As stated by the court in *Citizens for Responsible Behavior*, in reference to the offensive notice distributed by the initiative's proponents:

It fails utterly to make any distinction between homosexuals based on actual conduct or deportment, tarring all homosexuals—male and female alike—with the same brush of bizarre practices, gross promiscuity, and wilful exposure to probable disease. . . . All that is lacking is a sack of stones for

orientation in the state's hate crimes law, see Terry S. Kogan, *Legislative Violence Against Lesbians & Gay Men*, 1994 UTAH L. REV. 209.

²⁴⁸ Most modern lesbian and gay leaders point to the disturbances at the Stonewall Inn in Greenwich Village on June 27, 1969, as the symbolic beginning of the modern lesbian and gay movement in the United States, even though there were organizations and individuals working for liberation prior to this event. See Cain, *supra* note 246, at 1552.

²⁴⁹ See *supra* note 112.

throwing.²⁵⁰

It is precisely this type of irrational prejudice that the Equal Protection Clause is designed to prohibit, and that is based upon notions that the First Amendment should not allow.

VII. CONCLUSION

Conservative organizations around the country are sponsoring ballot measures which seek to restrict the rights of lesbians, gay men, and bisexuals. The courts must be diligent to protect constitutional principles when dealing with these measures. These initiatives pose serious threats to First Amendment, Guarantee Clause, and Equal Protection principles. Furthermore, the wording of the amendments and the campaigns surrounding them use factual inaccuracies and distortions in an attempt to prevent lesbians, gay men, and bisexuals from obtaining protection from their elected representatives against unfair discrimination. Courts must stringently enforce technical requirements and apply constitutional analysis to these measures. In order to avoid bitter, divisive campaigns which will cause increased polarization, the courts should strike these initiatives before they are placed on the ballot.

²⁵⁰ *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 658-59 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

APPENDIX A: ARIZONA'S PROPOSED INITIATIVE¹

PROPOSED INITIATIVE AMENDMENT TO THE CONSTITUTION OF THE STATE OF ARIZONA

TEXT OF PROPOSED AMENDMENT

Be it enacted by the people of Arizona:

The following amendment to the Constitution of Arizona, amending Article II, Section 13 to become valid when approved by the majority of the qualified electors voting thereon and upon proclamation of the governor:

Section 13. Equal privileges and immunities

- (1) No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.
- (2) NEITHER THIS STATE, THROUGH ANY OF ITS BRANCHES OR DEPARTMENTS, NOR ANY OF ITS AGENCIES, POLITICAL SUBDIVISIONS, MUNICIPALITIES OR SCHOOL DISTRICTS, SHALL ENACT, ADOPT OR ENFORCE ANY STATUTE, REGULATION, ORDINANCE OR POLICY WHEREBY PEDOPHILE, HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION, ARE THE BASIS OF, OR ENTITLE ANY PERSON OR CLASS OF PERSONS TO STATUS OR CLAIM OF DISCRIMINATION. THIS PARAGRAPH SHALL BE IN ALL RESPECTS SELF-EXECUTING.

¹ The initiatives in the following appendices were collected by the author and the original copies remain on file with him.

APPENDIX B: IDAHO'S PROPOSED INITIATIVE

REVISED VERSION OF IDAHO CITIZENS ALLIANCE'S ANTI-GAY INITIATIVE

Proposed Title 67, Chapter 80, Idaho Code

Section 67-8001: PURPOSE OF ACT. The provisions of Title 67, Chapter 80 of the Idaho Code are enacted by the people of the State of Idaho in recognition that homosexuality shall not form the basis for the granting of minority status. This chapter is promulgated in furtherance of the provisions of Article 3, Section 24 of the Constitution of the State of Idaho.

Section 67-8002: SPECIAL RIGHTS FOR PERSONS WHO ENGAGE IN HOMOSEXUAL BEHAVIOR PROHIBITED. No agency, department, or political subdivision of the State of Idaho shall enact or adopt any law, rule, policy, or agreement which has the purpose or effect of granting minority status to persons who engage in homosexual behavior, solely on the basis of such behavior; therefore, affirmative action, quota preferences, and special classifications such as "sexual orientation" or similar designations shall not be established on the basis of homosexuality. All private persons shall be guaranteed equal protection of the law in the full and free exercise of all rights enumerated and guaranteed by the U.S. Constitution, the Constitution of the State of Idaho, and federal and state law. All existing civil rights protection based on race, color, religion, gender, age, or national origin are reaffirmed, and public services shall be available to all persons on an equal basis.

Section 67-8003: EXTENSION OF LEGAL INSTITUTION OF MARRIAGE TO DOMESTIC PARTNERSHIPS ON HOMOSEXUAL BEHAVIOR PROHIBITED. Same-sex marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by any agency, department, or political subdivision of the State of Idaho.

Section 67-8004: PUBLIC SCHOOLS. No employee, representative, or agent of any public elementary or secondary school shall, in connection with school activities, promote, sanction, or endorse homosexuality as a healthy, approved or acceptable behavior. Subject to the provisions of federal law, any discussion of homosexuality within such schools shall be

age-appropriate as defined and authorized by the local school board of trustees. Counseling of public school students regarding such students' sexual identity shall conform in the foregoing.

Section 67-8005: EXPENDITURE OF PUBLIC FUNDS. No agency, department or political subdivision of the State of Idaho shall expend public funds in a manner that has the purpose or effect of promoting, making acceptable, or expressing approval of homosexuality. This section shall not prohibit government from providing positive guidance toward persons experiencing difficulty with sexual identity. This section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the normal library review process.

Section 67-8006: EMPLOYMENT FACTORS. With regard to public employees, no agency, department or political subdivision of the State of Idaho shall forbid generally the consideration of private sexual behaviors as nonjob factors, provided that compliance with the Title 67, Chapter 80, Idaho Code is maintained, and that such factors do not disrupt the workplace.

Section 67-8007: SEVERABILITY. The people intend, that if any part of this enactment be found unconstitutional, the remaining parts shall survive in full force and effect. This section shall be in all parts self-executing.

APPENDIX C: MAINE'S PROPOSED INITIATIVE

To the 118th Legislature of the State of Maine:

In accordance with Section 18 of Article IV, Part Third of the Constitution of the State of Maine, the undersigned electors of the State of Maine, qualified to vote for Governor, residing in Maine, whose names have been certified, hereby respectfully propose to the Legislature for its consideration the following entitled bill:

**AN ACT TO LIMIT PROTECTED CLASSES
UNDER THE MAINE HUMAN RIGHTS ACT**

The full text of this act is printed below on this petition. The question on the ballot will read as follows:

Do you favor the changes in Maine law concerning the limitation of protected status to the existing classifications of race, color, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status proposed by citizen petition?

Be it enacted by the People of the State of Maine:

5 M.R.S.A. Section 4552-A is enacted to read:

Section 4552-A - Limitation of protected class status

Notwithstanding any provision of this chapter or any other provision of law, protected classes or suspect classifications under state or local human rights laws, rules, regulations, ordinances, or policies, shall be limited to race, color, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status. Any provision of State or local law, rule, regulation, ordinance or policy inconsistent with the preceding sentence is hereby void and enforceable. This section shall not limit the power of the Legislature to add to the list of protected classes or suspect classifications enumerated in this section through future legislation.

APPENDIX D: MISSOURI'S PROPOSED INITIATIVE

Neither the State of Missouri, through any of its branches, departments or agencies, nor any of its political subdivision, including counties, municipalities and school districts, shall enact, adopt or enforce any statute, order, regulation, rule, ordinance, resolution or policy whereby homosexual, lesbian or bi-sexual activity, conduct or orientation shall entitle any person or class of persons to have or demand any minority status, protected status, quota preference, affirmative action or claim of discrimination.

This section shall be in all respects self-executing. This section is severable, and should any portion hereof be found unconstitutional, the remainder shall in all respects remain in force.

APPENDIX E: NEVADA'S PROPOSED INITIATIVE

THE MINORITY STATUS AND CHILD PROTECTION ACT

The Constitution of the State of Nevada is amended by creating a new section to be added to and made a part of Article 1. The new section shall be known as "The Minority Status and Child Protection Act" and will read as follows:

The People of the State of Nevada do enact as follows:

Section 21: MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED

- (1) The People of the State of Nevada find that inappropriate sexual behavior does not form an appropriate basis upon which to construct a minority or class status relation to civil rights. To identify oneself as a person who participates in or who expresses openly a desire for inappropriate sexual behavior, such as homosexuality, fails to constitute a legitimate minority classification. The People establish that objection to homosexuality based upon one's convictions is a Liberty and Right of Conscience and shall not be considered discrimination relating to civil rights by any unit, branch department or agency of state or local government. The People further establish that in the State of Nevada, including all political subdivisions and units of state and local government, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as "sexual orientation," "sexual preference," "domestic partnerships" or similar designations shall not be established on the basis of homosexuality.
- (2) Children, students and employees shall not be advised, instructed or taught by any government agency, department or political unit in the Stat [sic] of Nevada that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin; nor shall public funds be expended in a manner that has the purpose

of [sic] effect of promoting or expressing approval of homosexuality.

(a) The State of Nevada, political subdivisions and all units of state and local government shall not grant marital status or spousal benefits on the basis of homosexuality.

(b) The State of Nevada, political subdivisions and all units of state and local government, with regard to public employees, shall generally consider private lawful sexual behaviors as non-job related factors, provided such factors do not disrupt the work place and such consideration does not violate subsections (1) and (2).

(c) Though subsections (1) and (2) are established and in effect, no unit of state or local government shall deny to private persons business licenses, permits or services otherwise due under existing statutes; not deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Constitution of the State of Nevada or the Constitution of the United States of America.

(d) Though subsections (1) and (2) are established and in effect, this section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the existing library review process.

- (3) The PEOPLE INTEND, that if any part of this enactment be found unconstitutional, the remaining parts shall survive in full force and effect. This Section shall be in all parts self-executing.
- (4) Any person residing in the State of Nevada or non-profit entity doing business in this State has standing to bring suit to enforce the provision and policies of this Act.

APPENDIX F: WASHINGTON'S PROPOSED INITIATIVES

INITIATIVE 608

AN ACT relating to prohibiting special rights for homosexuals; adding new sections to chapter 49.60 RCW[;] and declaring an emergency.

Be it Enacted by the People of the State of Washington

NEW SECTION. Sec. 1.

THE EQUAL RIGHTS, NOT SPECIAL RIGHTS ACT. This act shall be known and cited as the Equal Rights, Not Special Rights Act.

NEW SECTION. Sec. 2.

A new section is added to chapter 49.60 RCW to read as follows:

PROTECTING CITIZEN'S CONSTITUTIONAL AND CIVIL RIGHTS. Neither the State of Washington, nor its political subdivisions, shall deny any right expressly guaranteed by the Constitution of the State of Washington or the Constitution of the United States of America.

Persons who commit acts of violence against the person or property of others should be prosecuted and appropriately punished in order to protect law-abiding citizens and to ensure the guarantee of equal justice for all.

NEW SECTION. Sec. 3.

A new section is added to chapter 49.60 RCW to read as follows:

ENSURING EQUAL PROTECTION OF THE LAW. The people find that equal protection of the law, not special rights, is a fundamental principle of constitutional government and is essential to the well-being and perpetuation of a free society.

The people further find that there is a legitimate and compelling state interest in ensuring equal protection of the law for all citizens and in preventing special rights based on any homosexual, bisexual, transsexual, or transvestite status, preference, orientation, conduct, act, practice, or relationship.

The people further find that there is a legitimate and compelling state interest in ensuring that the rights of parents to control the education of their children and that the sincerely-held values and beliefs of citizens regarding homosexuality, bisexuality, transsexuality, or transvestism are not denigrated or denied by the public schools and that homosexuality, bisexuality, transsexuality, or transvestism are not presented, promoted or approved as positive, healthy or appropriate behavior.

The people further find that “the duty of all teachers” as required in RCW 28A.405.030 “to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism” and “to teach them to avoid idleness, profanity and falsehood” is an indispensable prerequisite for providing a sound education, maintaining a virtuous and ethical society, and guaranteeing the rights of all citizens.

NEW SECTION. Sec. 4.

A new section is added to chapter 49.60 RCW to read as follows:

PROHIBITING SPECIAL RIGHTS FOR HOMOSEXUALS.

Neither the State of Washington, nor its political subdivisions, including counties, cities, towns, and school districts, shall by any means or instrumentality, enact or enforce a policy whereby any homosexual, bisexual, transsexual, or transvestite status, preference, orientation, conduct, act, practice, or relationship shall be a basis for a person to maintain any special classification or privilege; minority status; quota preference; affirmative action right; legal standing; public benefit; marital, spousal, parental, familial or domestic privilege, advantage, entitlement, benefit, position, or status; claim of discrimination; or special right or protection.

A school, through any employee, volunteer, guest, or other means or instrumentality, shall not present, promote or approve homosexuality, bisexuality, transsexuality, or transvestism, or any such conduct, act, practice, or relationship, as a positive, healthy, or appropriate behavior or lifestyle. As used in this section, "school" means any common school of the [S]tate of Washington.

NEW SECTION. Sec. 5.

CONSTRUCTION CLAUSE. The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. In the event of conflict between this act and any other provision of law, the provisions of this act shall govern.

NEW SECTION. Sec. 6.

SEVERABILITY CLAUSE. If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 7.

EMERGENCY CLAUSE. This act is necessary for the immediate preservation of the public peace, health, orals, or safety, or the support of the state government and its existing public institutions, and shall take effect immediately.

INITIATIVE 610

A Legislative Act by the People of the State of Washington.

AN ACT relating to how homosexuality will be viewed in law and in the public policy of the State of Washington. In this Act, homosexuality is defined as sexual desire for a person of the same gender, as determined by the individual's willingness to be openly self-identified with those desires, or sexual activity with individuals of the same gender.

Be it Enacted by the People of the State of Washington

New Section Section 1:

THE MINORITY STATUS AND CHILD PROTECTION ACT

This act shall be known and cited as The Minority Status and Child Protection Act.

New Section Section 2:

A new section is added to chapter 49.60 RCW to read as follows: THE SPECIAL RIGHT OF MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED.

The People find that inappropriate sexual behavior does not form an appropriate basis upon which to construct a minority or class status relating to civil rights. To identify oneself as a person who participates in or who expresses openly a desire for inappropriate sexual behavior, such as homosexuality, fails to constitute a legitimate minority classification.

The People establish that objection to homosexuality based upon one's convictions is a Right of Conscience and shall not be considered discrimination relating to civil rights by any unit, branch department or agency of state or local government.

The People further establish that in the State of Washington, including all political subdivisions and units of state and local government, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as "sexual orientation," "sexual preference," "domestic partnerships" or similar designations shall not be

established on the basis of homosexuality.

No public funds shall be expended in a manner that has the purpose or effect of promoting or expressing approval of homosexuality. This provision shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the existing library review process.

With regard to public employees, no agency, department or political subdivision of the State of Washington shall forbid generally the consideration of private lawful sexual behaviors as non-job related factors, provided that such consideration does not violate the provisions and purposes of this Act and that such factors do not disrupt the workplace.

New Section Section 3:

A new section is added to chapter 28A.150 RCW to read as follows:

THE PUBLIC EDUCATIONAL SYSTEM SHALL NOT PROMOTE OR EXPRESS APPROVAL OF HOMOSEXUALITY.

The People establish that no person representing the state educational system as an employee, student, volunteer or guest shall undertake any activity that would in any manner advise, instruct, teach or promote to any child, student or employee that homosexuality is a positive or healthy lifestyle, or an acceptable or approved condition or behavior. The educational system is to be in full compliance with chapter 49.60 RCW.

New Section Section 4:

A new section is added to chapter 26.33 RCW to read as follows: **FOSTER PARENT STATUS AND ADOPTION BY PERSONS PARTICIPATING IN HOMOSEXUALITY PROHIBITED.**

The People find that there is a compelling state interest in placement of minor children, where at all possible, in sound, married, male-female households and that such children must never be placed in households where homosexuality is present in any manner whatsoever. Any person participating in homosexuality shall not be an adoptive, foster or placement parent.

The People further establish that, upon the dissolution of a marriage in which one of the natural parents or other legal classification of parent is participating in homosexuality, the minor child, wherever legally possible, will be placed in the custody of the parent not participating in homosexuality. Where both parents are unqualified, custody shall be awarded to the next closest natural relative; such as, grandparents, brothers or sisters, aunts or uncles and so forth. All consideration is to the well being of the minor child and it is the policy of the State of Washington that sound natural family relationships are the most important initial consideration that will maintain that well being. Where this is not possible, an adoptive or foster parent situation is to be ensured.

Every appropriate court and government agency in the State of Washington shall enforce the provisions of this section and, at all placement or custody proceedings, shall enter and maintain a written finding that the prospective custodial, foster or placement parent does not participate in homosexuality.

New Section Section 5:

A new section is added to chapter 26.04 RCW to read as follows:

MARRIAGE BETWEEN PERSONS OF THE SAME GENDER
PROHIBITED AND NATURAL GENDER DEFINED.

The People establish that same-gender marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by any agency, department or political subdivision of the State of Washington. The State of Washington recognizes that the gender that is established at the conception of all persons is the only and natural gender of that person for the duration of their life. Any physical alternations to the human body do not affect the natural gender, known at birth or before, of any resident in the State of Washington. Any same-gender marriage or gender alteration obtained or recognized outside the State of Washington shall not constitute a valid or legal marriage or gender within the State of Washington.

New Section Section 6:

A new section is added to chapter 49.60 RCW to read as follows:

ALL CONSTITUTIONAL RIGHTS PROTECTED FOR EVERY CITIZEN.

In the State of Washington and its political subdivisions, no Unit, agency, or department of government shall deny to private persons business licenses, permits or services otherwise due under existing statutes, nor deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Constitution of the State of Washington or the Constitution of the United States of America.

New Section Section 7:

SEVERABILITY AND CONSTRUCTION CLAUSE.

The PEOPLE INTEND that, if any part of this enactment be declared unconstitutional by a court of competent jurisdiction, the remaining parts shall survive in full force and effect. This enactment shall in all parts be self-executing. In the event that a conflict arises between this legislation and any other provision of law, the policies and purposes of this Act shall govern.

New Section Section 8:

LEGAL STANDING.

Any person residing in the State of Washington or non-profit entity doing business in this state has standing to bring suit to enforce the provisions and policies of this Act.

APPENDIX G: COLORADO AMENDMENT TWO
(ENJOINED)

Be it Enacted by the People of the State of Colorado:

Article 2, of the Colorado Constitution is amended by the addition of Sec. 30, which shall state as follows:

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

**APPENDIX H: FLORIDA'S PROPOSED
INITIATIVE (STRUCK BY FLORIDA SUPREME
COURT)**

TITLE:

**LAWS RELATED TO DISCRIMINATION ARE RESTRICTED TO
CERTAIN CLASSIFICATIONS**

SUMMARY:

Restricts laws related to discrimination to classifications based upon race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. Repeals all laws inconsistent with this amendment.

FULL TEXT OF PROPOSED AMENDMENT:

BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

Therefore, to the extent permitted by the Constitution of the United States, the people of Florida, exercising their reserved powers, hereby declare that:

- 1) Article 1, Section 10 of the Constitution of the State of Florida is hereby amended by:
 - a) inserting "(a)" before the first word thereof and,
 - b) adding a new sub-section "(b)" at the end thereof to read:

"(b) The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. As used herein the term "sex" shall mean the biological state of being either a male person or a female person; "marital status" shall mean the state of being lawfully married to a

person of the opposite sex, separated divorced, widowed or single; and "familial status" shall mean the state of being a person domiciled with a minor, as defined by law, who is the parent or person with legal custody of such minor or who is a person with written permission from such parent or person with legal custody of such minor."

- 2) All laws previously enacted which are inconsistent with this provision are hereby repealed to the extent of such inconsistency.
- 3) This amendment shall take effect on the date it is approved by the electorate.

APPENDIX I: CINCINNATI'S PROPOSITION **(ENJOINED)**

We, the undersigned, Electors of the City of Cincinnati, Ohio, petition your honorable body to forthwith provide by ordinance, for the submission to the Electors of said City of Cincinnati, the following proposed Amendment to the charter of the City, to wit:

AMENDMENT

TITLE: NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

An amendment to the Charter of the City of Cincinnati to adopt a supplementary Article XII to prohibit the City of Cincinnati from enacting, adopting, enforcing or administering any ordinance, regulation, rule of policy which provides that homosexual, lesbian or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

TEXT: Be it resolved by the people of Cincinnati that a new Article XII be added to the Charter of the City of Cincinnati to prohibit the City from granting special class status based upon sexual orientation, conduct or relationships, to read as follows:

ARTICLE XII

NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

APPENDIX J: OREGON'S MEASURE NINE
(REJECTED BY ELECTORATE)

OREGON: MEASURE NINE TO AMEND CONSTITUTION

This referendum measure, which was defeated in the general election, November 3, 1992, included the following proposed amendment to the Oregon constitution:

Be it Enacted by the People of the State of Oregon:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article I and to read:

SECTION 41 (1) This state shall not recognize any categorical provision such as "sexual orientation", "sexual preference", and similar phrases that includes homosexuality, pedophilia, sadism or masochism. Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.

(2) State, regional and local governments and their properties and monies shall not be used to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism.

(3) State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.

(4) It shall be considered that it is the intent of the people in enacting this section that if any part thereof is held unconstitutional, the remaining parts shall be held in force.

